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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

WARRIOR & GULF NAVIGATION COMPANY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Eleventh Circuit exceed the limits of appropriate judicial review in vacating a labor arbitration award, based on the court's own interpretation of what the court regarded as the "plain language" of collective bargaining agreement provisions governing discharge cases, in direct conflict with decisions of the First, Third, Fifth and Sixth Circuits upholding arbitration awards interpreting indistinguishable contract provisions.

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PETITION FOR WRIT OF CERTIORARI

The United Steelworkers of America, AFL-CIO-CLC, hereby petitions for a writ of certiorari to enable this Court to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *Warrior & Gulf Navigation Co. v. United Steelworkers of America*, 996 F.2d 279 (11th Cir. 1993).

OPINIONS BELOW

The opinion of the court of appeals is reported at 996 F.2d 279 (11th Cir. 1993), and is reproduced as Appendix A (1a-6a). The opinion of the district court is unreported, and is reproduced as Appendix B (7a-23a). The order of the court of appeals denying rehearing is unreported, and is reproduced as Appendix C (24a-25a). The arbitration award is unreported, and is reproduced as Appendix D (26a-46a).

JURISDICTION

The opinion and judgment of the court of appeals were issued on July 27, 1993. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on December 20, 1993. This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185(a), provides in pertinent part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

1. Warrior & Gulf Navigation Company (the "Company") and the United Steelworkers of America (the "Union") are parties to a collective bargaining agreement (the "Agreement") containing the following standard grievance-arbitration provision, which establishes a five-step procedure culminating in final and binding arbitration:

> Should differences arise between the Company and the Union or its members employed by the Company *as to the meaning and application of the provisions of this Agreement*, or should any local trouble of any kind arise, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle such differences immediately in the following manner.
>
> . . . .
>
> Fifth, if agreement has not been reached the matter shall be referred to an impartial umpire for

> decision. . . . *The decision of the umpire shall be final.*
>
> . . . .
>
> . . . The decision reached at any state of the proceedings shall be binding on both parties thereto and shall not be subject to re-opening by any other party except by mutual agreement. [Agreement, Section 12 (emphasis added).]

In 1991, a dispute arose between the parties concerning the Company's decision to discharge a bargaining unit member, Rudolph Files. Pursuant to the above-quoted contract provision, this dispute was processed through the five-step grievance-arbitration procedure and ultimately submitted for decision by an impartial arbitrator.

2. The parties stipulated to the substantive arbitrability of the grievance, and the parties framed the issue to be decided by the arbitrator as follows:

> Did the company have just cause to terminate the employment of the grievant.
>
> If not, what should the remedy be. [App. 25a.] [1]

3. a. The arbitrator set forth the undisputed facts surrounding Files' discharge from employment with the Company. Those facts are as follows:

In February 1988, Files was suspended without pay for 14 days after his urine sample tested positive for the presence of marijuana. App. 28a. Company records show that during the period from June 2, 1988 through April 3, 1990, the Company required Files to take five additional drug tests, all of which were negative. *Id.* 32a.

On April 17, 1991, the Company directed Files to take a drug test following an on-the-job injury. In compliance

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[1] The Company would have added to the issue presented the following clause: " 'if the parties had contractually agreed to what just cause is, then that standard should be the applicable standard.' " App. 25a n.1.

with the Company's directive, Files supplied a urine sample to the Company's outside contractor, the McGregor Medical Clinic. On April 29, 1991—before the results of the April 17, 1991 drug test were reported to the Company by the Clinic—the Company directed Files to provide another urine sample. Files again complied. *Id.* 28a-29a, 33a.

The result of the April 17, 1991 test was positive for the presence of marijuana, and the result of the April 29, 1991 test was negative. Based on the positive test of April 17, 1991, and the earlier positive test of February 1988, the Company discharged Files. The Union thereafter filed a timely grievance protesting Files' discharge. *Id.*

b. In determining the threshold issue framed by the parties—whether the company had "just cause" to discharge Files—the arbitrator began by quoting from the grievance-arbitration provision (Section 12 of the Agreement) and from other provisions of the Agreement that the arbitrator identified as relevant to the proper resolution of that issue. *See* App. 25a-27a. The portions of the grievance-arbitration provision set forth by the arbitrator are quoted *supra* at pp. 2-3. The other provisions of the Agreement identified as relevant by the arbitrator provide, in pertinent part, as follows:

> *Section 13—DISCHARGE CASES*
>
> In the event a member of the Union shall be discharged from his employment and believes he has been unjustly dealt with, such discharge shall constitute a case arising under the method of adjusting grievances herein provided. In the event it should be decided under the rules of this Agreement that an injustice has been dealt the employee with regard to the discharge, the Company shall reinstate such employee and pay full compensation at the employee's

regular rate for the time lost or pay compensation in accordance with the arbitrator's decision.

Section 14—MANAGEMENT

The Management of the Company and the direction of the working force, including the right to hire, suspend or discharge for *proper cause* . . . is vested exclusively in the Company, provided that his will not be used for purposes of discrimination against any member of the Union. . . .

Section 23—DRUG TESTING

. . . .

4. Employees may be tested by the Company and/or a physician of its choice on a random basis, or for cause, to determine intoxification and/or prior usage of controlled substances. . . . If the result of the test is positive, the Company may require the employee to submit to further testing to determine fitness for duty, but if there is no evidence that the employee is then under the influence, the procedures in Paragraph 6 of this Agreement shall apply.

. . . .

6. (a) In the event a positive result is obtained in a test of an employee and there is no evidence of influence or intoxification, the individual will be suspended without pay for a minimum of 14 days.

(b) In the event a positive result is obtained in a test administered to an employee who has been suspended without pay pursuant to sub-paragraph 6 (a) above, *the employee is subject to immediate discharge.* [App. 25a-27a (quoting Agreement) (emphasis added).]

c. In his decision, the arbitrator rejected as unsupported by the facts the Union's challenge to the legitimacy of the results of the April 17, 1991 drug test. *Id.* 35a-36a. However, the arbitrator went on to find that, under the circumstances presented, the Company had failed to

meet its burden of proving that it had discharged Files for "just cause." *Id.* 41a-43a.

On this point, the arbitrator explained that the troubling question before him was how to assess "the impact of conflicting results from two employer generated drug tests administered within 12 days of each other." *Id.* 42a. The arbitrator elaborated:

> [W]hen the company required that Files submit a urine sample for testing on April 29, it changed the rules of the game. Thus, had the urine sample of April 17 proven negative for drugs, and the sample of April 29 proven positive for drugs, certainly the company would have discharged Files pursuant to Section 23, paragraph 6(b) of the labor agreement.
>
> It is only correct and just that the company cannot have it both ways. When it required Files to submit a urine sample on April 29, the company in effect was telling Files that the April 29 test was the one on which Files' continued employment would hinge. Files passed the April 29 test. Accordingly, the company has failed to establish just cause for discharge by clear and convincing evidence.
>
> . . . .
>
> Stated differently, just cause means that the employee must be given a "fair shake". [*Id.* 42a-43a.] [2]

4. The Company filed suit in federal district court seeking to vacate the arbitration award, and the Union counterclaimed for enforcement of the award. The district court vacated the award on the Company's motion for summary judgment, and the court of appeals affirmed.

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[2] Having concluded that the Company discharged Files without "just cause," the arbitrator went on to consider the second prong of the issue put to him by the parties—*viz.*, the appropriate remedy. On this point, the arbitrator found that Files should be reinstated to his prior position, but without back pay, back benefits or the accumulation of seniority between the date of discharge and the date of reinstatement. App. 43a.

The basis of the court of appeals' holding is succinctly stated in the court's opinion:

> A court generally must defer to an arbitrator's findings of fact. *United Paperworkers Int'l. Union v. Misco, Inc.*, 484 U.S. 29, 37-38, 108 S.Ct. 364, 370, 98 L.Ed.2d 286 (1987). Once those facts are found, however, an arbitrator "may not ignore the plain language of the contract." *Misco*, 484 U.S. at 38, 108 S.Ct. at 371. . . .
>
> The Agreement says that an employee who tests positive a second time is "subject to immediate discharge." *This express language gives management the complete discretion to fire an employee. . . .*
>
> We stop short of the question of how much discretion arbitrators have in interpreting the "just cause" provision of a contract in cases where their interpretations do not conflict with a specific and express contractual provision. *Because the Agreement expressly addresses the particular contingency of a second positive drug test, we conclude that the Agreement's "just cause" standard is consistent with this explicit provision.*
>
> . . . Under these circumstances, we conclude *as a matter of law* that Warrior, pursuant to the terms of the pertinent agreement, had "just cause" to fire Files. [*Id.* 4a-5a (emphasis added).]

REASONS FOR GRANTING THE WRIT

It is common for collective bargaining agreements to contain provisions of the kind at issue here: (i) a provision limiting an employer's right to discharge employees to situations in which the discharge is for "just" or "proper" cause; (ii) a provision stating that certain specified conduct will "subject" employees to—or "may result in"—discharge; and (iii) a provision requiring that all disputes concerning the "interpretation" and "application" of the agreement be subject to an exclusive dispute resolu-

tion system culminating in a final and binding decision by an impartial arbitrator.

Five circuits have now addressed the validity of arbitral decisions holding a discharge to be contrary to the governing collective bargaining agreement in that, in the circumstances of each case, the employer did not have "just cause" to discharge an employee who had engaged in conduct that would, under the applicable contract, "subject" the employee to discharge. These arbitral decisions represent the mainstream of the arbitral law which reads the two provisions together to mean that the fact that an employee has engaged in conduct that renders him "subject to discharge" does not necessarily establish that the employer has "just cause" for discharge.

The First, Third, Fifth and Sixth Circuits have each *upheld* such arbitral decisions on the ground that the contracting parties had empowered the arbitrator, not the court, to interpret these contractual provisions, and that the arbitrator's interpretation must be upheld because it draws its essence from the contract.

In direct conflict with those decisions, the Eleventh Circuit in the instant case interpreted the collective bargaining agreement for itself—and in particular determined the proper interplay between the "just cause" provision and the "subject to immediate discharge" provision by itself.[3]

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[3] Thus, the court below stated:

> Th[e] express language ["subject to immediate discharge"] gives management the complete discretion to fire an employee. . . .
>
> . . . Because the Agreement expressly addresses the particular contingency of a second positive drug test, we conclude that the Agreement's "just cause" standard is consistent with this explicit provision. . . .
>
> . . . Under these circumstances, we conclude as a matter of law that Warrior, pursuant to the terms of the pertinent agreement, had "just cause" to fire Files. [App. 4a-5a.]

It is common for unions to negotiate nationwide contracts that cover all of an employer's facilities throughout the country, and also to negotiate different contracts containing standard provisions with employers in various sections of the country. Unless there is a uniform understanding of the respective roles of courts and arbitrators, the contracting parties' agreement to place the resolution of contractual issues exclusively in the hands of neutral arbitrators will have a different meaning from circuit to circuit, and a different effect. The same award under the same contract language would be enforced in one circuit, and vacated in another. And the same award under the same contract would as a practical matter be final in one circuit, and a step in a process leading to ultimate judicial intervention rather than a final and binding resolution of contractual disputes in another.

The circuit conflict here thus implicates federal labor policy in two basic respects. First, the existence of the circuit conflict threatens the policy of uniformity that animates section 301 of the LMRA. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209, 211 (1985). Second, determination of the proper scope of judicial review of labor arbitration decisions gives content to the national labor policy favoring the resolution of disputes arising under collective bargaining agreements through private systems. *See Misco, supra*, 484 U.S. at 36-37.

Moreover, the circuit conflict here arises in a particularly important context. Discharge cases represent a major portion of the cases that are resolved in labor arbitrations, and an arbitral award upholding a discharge has commonly been considered "industrial capital punishment." Elkouri & Elkouri, *How Arbitration Works*, at 650, 661 n.60 (4th ed. 1985).

I.

As we noted at the outset, four circuits, facing contract provisions that are identical in all relevant respects to those here, have, in direct conflict with the decision

below, upheld arbitral awards that had found a discharge to be without "just cause" even though the employee was found to have engaged in conduct specified in the contract as conduct that would subject an employee to discharge. We detail those conflicting decisions at this juncture.

1. Third Circuit.

In *ARCO-Polymers, Inc. v. Local 8-74*, 671 F.2d 752 (3d Cir.), *cert. denied*, 459 U.S. 828 (1982), the collective bargaining agreement contained a provision stating that "[e]mployees absent from work without good and sufficient cause for more than four (4) consecutive days *shall be subject to discharge*," and a separate provision stating that "[e]mployees shall be discharged only for *just cause*." *Id.* at 752-53 (emphasis added). The arbitrator found that a discharged employee had been absent from work for more than four consecutive days without good and sufficient cause, but concluded that the discharge was without "just cause" in light of the employee's prior record. *Id.* at 753-74.

The Third Circuit, in upholding the arbitrator's award, began by noting that "federal courts are not to substitute their judgment for that of the arbitrator. . . . [T]he interpretation of labor arbitrators must not be disturbed so long as they are not in manifest disregard of the law, and that whether the arbitrators misconstrued a contract does not open the award to judicial review." *Id.* at 755 (internal quotations omitted). The court then determined that application of these principles required that the arbitrator's award in that case be upheld, and did so even though the arbitrator had not spelled out his reasoning [4]:

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[4] Although the arbitrator in *ARCO-Polymers*—like the arbitrator here—did not explicate his interpretation of the contract in his award, this Court has held that judicial deference to arbitral interpretations remains the rule "even when the basis for the arbitrator's decision may be ambiguous." *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum &*

> The Union recognizes that article XXVI, section B(1) specifically provides that the absence of an employee without good and sufficient cause for more than four days subjects an employee to discharge. It cannot be said with absolute certainty, however, that discharge under this section is "strictly a function of management." . . . The arbitrator's award permits the inference that he considered whether discharge under article XXVI, section B(1) is strictly a function of management once it is found that the employee was absent without good and sufficient cause or whether the arbitrator has the authority, based upon article XVI, section J(1) to reinstate an employee upon a finding that the employee was not discharged for just cause. It is also possible that "shall be subject to discharge" suggested to the arbitrator that the clause was nonmandatory. . . .
>
> Thus, the arbitrator might have found that all discharges are subject to the "just cause" provision in article XVI, section J(1) and that consequently the contract authorized him to apply all the surrounding facts and circumstances to his interpretation of the contract to determine whether or not discharge is proper. . . . Such an interpretation would certainly not manifestly disregard the language of the agreement or lack support from principles of contract construction. The arbitrator's award may represent an implicit resolution of an inherent tension between sections B(1) and J(1). Certainly it was his obliga-

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Plastic Workers, 461 U.S. 757, 764 (1983). As the court put the matter in *ARCO-Polymers*, "courts should not disturb ambiguous, unclear, and even deliberately opaque arbitration opinions because the policy in favor of the peaceful resolution of labor disputes through arbitration outweighs any damage which arbitration might cause." 671 F.2d at 755 (internal quotations omitted). *See also Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1506 (7th Cir. 1991) ("[t]he arbitrator's failure to mark [the interpretive route to his decision] is not a defect for which a court asked to set aside the award can provide a remedy").

tion to resolve any conflicts in construction. [*Id.* at 756 (citations and footnote omitted).][5]

2. First Circuit.

In *Crafts Precision Industries v. Lodge No. 1836 of District 38, Int'l Ass'n of Machinists & Aerospace Workers*, 889 F.2d 1184 (1st Cir. 1989), the collective bargaining agreement incorporated by reference a shop rule listing as an "example of conduct [that] *may result in suspension, or immediate discharge*, for the first offense: . . . [i]nsubordination, willful disregard for, or refusal to comply with instructions from Management/Supervisory personnel;" and the agreement also contained a standard "*just cause*" provision. *Id.* at 1184-85 (emphasis added).

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[5] *See also Super Tire Eng'r v. Teamsters Local Union No. 676*, 721 F.2d 121 (3d Cir. 1983), *cert. denied*, 469 U.S. 817 (1984). In that case, a section of the collective bargaining agreement prohibited discharges without "just cause," and also prohibited discharges without notice to the union business agent "except where the provisions of this Section provide for immediate dismissal;" "the provisions of this section" in turn provided for immediate dismissal (without notice to the business agent) for "proven drinking during working hours." *Id.* at 122 & n.1. The arbitrator found that a discharged employee had in fact been drinking during working hours, but concluded that the discharge was without "just cause" because there was "no evidence of a prior immediate dismissal of an employee for drinking, no general warning of company policy, and no such warning to [the grievant]." *Id.* at 123. The court upheld the award under its prior decision in *ARCO-Polymers*:

> The award in the present case is similar to that upheld in *ARCO-Polymers*. Because the arbitrator held the specific dismissal provision subject to an overall just cause provision, he then was free to determine whether there was just cause for dismissal, applying his expertise and the law of the shop. As in *ARCO-Polymers*, "We cannot say that the arbitrator's award does not draw its essence from the contract." 671 F.2d at 756-57. In the absence of an unambiguous provision in the agreement mandating dismissal or removing an arbitrator's review function, we will not set aside an arbitrator's decision to review a dismissal in light of the mix of factors that make up just cause. [721 F.2d at 125.]

The arbitrator found that a discharged employee's conduct fell within the scope of the "immediate discharge" provision, but concluded that the employee had been discharged without "just cause" because the employer had failed to consider "past practice at the plant, [the employee's] record, and his polite behavior." *Id.*

The First Circuit, emphasizing *Misco*'s admonition that "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision," 484 U.S. at 38, found several "plausible arguments" supporting the arbitrator's determination that the employee's violation of the shop rule did not necessarily constitute "just cause" for discharge. 889 F.2d at 1185. On that basis, that court upheld the arbitrator's award.

3. Sixth Circuit.

In *Eberhard Foods, Inc. v. Handy*, 868 F.2d 890 (6th Cir. 1989), the employer and union agreed to a work rule specifying that employees who fight on company time or property are *"subject to discharge for the first offense;"* the collective bargaining agreement also contained a standard *"just cause"* provision. *Id.* at 890-91 (emphasis added). The arbitrator found that an employee who had been discharged for fighting on company time was in fact guilty of that offense, but concluded that the discharge was without "just cause" because the employee had been penalized more severely than a similarly-situated employee. *Id.* at 891. The district court vacated the arbitration award, and the Sixth Circuit reversed. The Sixth Circuit, in upholding the arbitrator's award, observed that under *Misco* a federal court is bound to defer to an arbitrator's construction of the parties' contract. *Id.* at 892. Because the arbitrator had "construed the contract as authorizing him to review employer sanctions [for violations of the no-fighting rule]," *id.*, the court held that under

Misco the arbitrator's decision was immune from attack, "[a]lthough the case is a close one," *id.* at 893.[6]

4. Fifth Circuit.

The issue presented here has also been recently confronted by the Fifth Circuit, which affirmed without opinion a decision upholding an arbitration award by the United States District Court for the Northern District of Mississippi. *See Kerr-McGee Chem. Corp. v. United Steelworkers of America*, 800 F. Supp. 1405 (N.D. Miss. 1992), *aff'd mem.*, 988 F.2d 1214 (5th Cir. 1993).

In *Kerr-McGee*, the collective bargaining agreement contained a provision stating that "[s]hould an employee test positive for one or more illegal drugs or controlled substance[s], he shall be *subject to immediate discharge*, as well as a standard "*just cause*" provision." 800 F. Supp. at 1407 (emphasis added). Three employees who tested positive for use of marijuana were discharged by the employer, and the union filed grievances on their behalf challenging the discharges. The arbitrator found as fact that the drug tests had been accurate and reliable, *id.*, but nonetheless concluded that the discharges had been without "just cause" under the circumstances presented because the employer had failed to (1) give each employee an opportunity to explain; (2) analyze the employee's work and safety history; (3) consider prior incidents of impairment; and (4) explore the employee's interest in a substance abuse rehabilitation program, *id.* at 1408.

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[6] In a subsequent case presenting similar facts, the Sixth Circuit relied on *Eberhard* to uphold an arbitration award reinstating an employee who had been summarily discharged for using alcohol while on duty, pursuant to a contract provision specifying that "no warning notice need be given to an employee before he is discharged or suspended for dishonesty, drunkenness, use of alcoholic beverages or narcotics while on duty." *See Dixie Warehouse & Cartage Co. v. General Drivers, Warehousemen & Helpers, Local Union No. 89*, 898 F.2d 507 (6th Cir. 1990).

The district court, in dismissing the employer's suit to vacate the arbitration award, rejected the employer's contention that the award did not "draw its essence" from the labor agreement because the agreement "plainly and unambiguously state[d] that a positive test will 'subject' the employee to 'immediate discharge.'" *Id.* at 1410. That court reasoned that it was for the arbitrator and not the court to decide whether this contract language —as read in the light of other relevant contract language—should be interpreted as giving the employer the complete discretion to discharge employees who tested positive for drugs. *Id.* at 1410-11. And the court concluded: "While the undersigned confesses that he probably would have reached a different result given the same contract language, [the arbitrator's] decision drew its essence from the contract nonetheless." *Id.* at 1411 (footnote omitted).

II.

This conflict in the circuits is but one manifestation of a deep disagreement among the courts of appeals on the federal courts' authority to correct asserted "misinterpretations" of a labor contract by an arbitrator.

The *Steelworkers* Trilogy establishes that:

> [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his. [*United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960).]

And this Court's *Misco* decision adds:

> Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. [484 U.S. at 37-38.]

In what we believe is the correct understanding and elaboration of the foregoing, Judge Posner speaking for the Seventh Circuit has written:

> An agreement to submit a dispute over the interpretation of a labor or other contract to arbitration is a contractual commitment to abide by the arbitrator's interpretation. If the parties want, they can contract for an appellate arbitration panel to review the arbitrator's award. But they cannot contract for *judicial* review of that award; federal jurisdiction cannot be created by contract. Unless the award was procured by fraud, or the arbitrator had a serious conflict of interest—circumstances that invalidate the contractual commitment to abide by the arbitrator's result—his interpretation of the contract binds the court asked to enforce the award or to set it aside. The court is forbidden to substitute its own interpretation even if convinced that the arbitrator's interpretation was not only wrong, but plainly wrong. [*Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991) (emphasis by court).]

And the Ninth Circuit, *en banc*, has stated:

> Since the labor arbitrator is designed to function in essence as the parties' surrogate, he cannot "misinterpret" a collective bargaining agreement. As Professor St. Antoine observes, "[i]n the absence of fraud or an overreaching of authority on the part of the arbitrator, he is speaking for the parties, and his award *is* their contract. [*Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173*, 886 F.2d 1200, 1205 (9th Cir. 1989) (*en banc*) (quoting St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 Mich. L. Rev. 1137, 1140 (1977)) (emphasis in original), *cert. denied*, 495 U.S. 946 (1990).]

But as the instant case shows, there is a counter view that *Misco* contemplates that the courts not only assure

that the arbitrator's decision is *an* interpretation of the collective bargaining agreement, but also that it is an interpretation that the reviewing court determines is consistent with the contract's literal language.

Thus, here, the Eleventh Circuit took *Misco*'s statement that an arbitrator "may not ignore the plain language of the contract," 484 U.S. at 38, as an invitation to adopt the court's own interpretation of the operative contract provisions and of the interplay between those provisions.[7]

Other circuit court decisions, in cases presenting labor contract interpretation questions different from the particular contract question raised by the instant case, have stated general legal standards that validate just the kind of intrusive judicial review that the Eleventh Circuit indulged in here. *See, e.g., Monroe Auto Equipment v. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America,* 981 F.2d 261 (6th Cir. 1992) ("[a]n award fails to derive its essence from the agreement when (1) it conflicts with express terms of the agreement; (2) it imposes additional requirements not expressly provided for in the agreement; (3) it is not rationally supported by or derived from the agreement; or (4) it is based on general considerations of fairness and equity instead of the exact terms of the agreement") (internal quotations omitted), *cert. denied,* 113 S. Ct. 2396 (1993); *George A. Hormel & Co. v. United Food & Commercial Workers, Local 9,* 879 F.2d 350 (8th Cir. 1989) ("this court has vacated awards where the award's result is one so contrary to common experi-

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[7] The language from *Misco* in question, when read in its context, does not provide a basis for what the Eleventh Circuit did:

> The arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract. *Enterprise Wheel, supra,* at 599. [484 U.S. at 38.]

ence and logic that it is more likely than not that such result was not the intent of the parties, and where *additional* facts exist that strongly indicate that the arbitrator did not premise his award on the contract, notwithstanding his words to the contrary") (emphasis by court).[8]

The approach of these decisions is bottomed on different principles than those underlying the Seventh Circuit's *Chicago Typographical Union* approach or the Ninth Circuit's *Stead Motors* approach. Both of those cases recognize that where, as here, the parties have agreed to commit a particular question of contract interpretation to final and binding resolution by an impartial arbitrator, and where, as here, the arbitrator has rendered an interpretation of the contractual provisions at issue, the arbitrator's "award *is* [the parties'] contract," unless it can be shown that the award was not in fact based on the arbi-

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[8] The substantial number of 2-1 decisions in this area in the post-*Misco* period illustrate the pliability of the standards currently applied by a number of courts of appeals in reviewing labor arbitration awards. *See, e.g., Monroe Auto Equipment, supra,* 981 F.2d 261; *Coca-Cola Bottling Co. v. Teamsters Local Union No. 688,* 959 F.2d 1438 (8th Cir.), *cert. denied,* 113 S. Ct. 635 (1992); *Walker v. Consolidated Freightways, Inc.,* 930 F.2d 376 (4th Cir.), *cert. denied,* 112 S. Ct. 636 & 637 (1991); *Lattimer-Stevens Co. v. United Steelworkers of America,* 913 F.2d 1166 (6th Cir. 1990); *Litvak Packing Co. v. United Food & Commercial Workers, Local Union No. 7,* 886 F.2d 275 (10th Cir. 1989); *International Bhd. of Elec. Workers, Local 429 v. Toshiba America, Inc.,* 879 F.2d 208 (6th Cir. 1989); *Hormel, supra,* 879 F.2d 347; *Berklee Chapter of Mass. Fed'n of Teachers, Local 4412,* 858 F.2d 31 (1st Cir. 1988), *cert. denied,* 493 U.S. 810 (1989); *Florida Power Corp. v. International Bhd. of Elec. Workers,* 847 F.2d 680 (11th Cir. 1988). *See also S.D. Warren Co. v. United Paperworkers' Int'l Union, Local 1069,* 846 F.2d 827, 829 (1st Cir.) (Coffin, J., concurring) (finding that *Misco* "requires that we affirm" the challenged arbitration award, but nevertheless concurring in the majority opinion vacating the award on the ground that a companion case decided by another First Circuit panel on remand for consideration in light of *Misco* "has become the law in this circuit and therefore controls the instant case"), *cert. denied,* 488 U.S. 992 (1988).

trator's interpretation of the contract but was procured by fraud or tainted by a conflict of interest.

III.

As the foregoing demonstrates, both as to the specific issue raised by this case and on a more general level, there is conflict and uncertainty in the circuit courts as to the circumstances in which a federal court may override a contract interpretation of an impartial arbitrator chosen by the parties to a collective bargaining agreement to resolve disputes under the agreement. This conflict and uncertainty has led one federal appellate judge to state: "Review of arbitration decisions is one of the more difficult and standardless enterprises facing an appellate judge." *Lattimer-Stevens, supra,* 913 F.2d at 1170 (Boggs, J., dissenting). Both the broad form of judicial intervention into these private systems sanctioned by the Eleventh Circuit, and the present unsettled state of the law in the courts of appeals on the governing standard of judicial review, can only encourage unwarranted lawsuits seeking to vacate labor arbitration awards. This Court should grant *certiorari* in this case to resolve the circuit conflict and provide a definitive resolution of the role of courts in reviewing contract interpretations in labor arbitration awards.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 92-6543

WARRIOR & GULF NAVIGATION COMPANY,
Plaintiff-Counterclaim,
Defendant-Appellee,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Defendant-Counterclaim,
Plaintiff-Appellant.

Appeal from the United States District Court
for the Southern District of Alabama

July 27, 1993

Before ANDERSON and EDMONDSON, Circuit Judges, and YOUNG*, Senior District Judge.

PER CURIAM:

This case involves a dispute over an arbitrator's discretion to interpret the collective bargaining agreement ("Agreement") between plaintiff Warrior & Gulf Navigation Company ("Warrior") and defendant United Steelworkers of America ("USW"). The arbitrator determined that Warrior should not have terminated a Warrior employee. The district court reversed this decision and

* Honorable George C. Young, Senior U.S. District Judge for the Middle District of Florida, sitting by designation.

granted Warrior summary judgment. USW now appeals. Because we conclude that the arbitrator's remedy contradicted the express language of the Agreement, we AFFIRM the district court's decision.

I. Facts and Background

The Agreement gives Warrior the authority to drug test its employees, on a random basis and for cause.[1] After the first positive test for drug use, Warrior may suspend an employee for two weeks [2] and may retest the employee every seven days.[3] An employee who tests positive a second time is "subject to immediate discharge." [4]

The Agreement also suggests that Warrior must have "just cause" to fire an employee.[5] If there is a disagreement

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[1] Agreement § 23.4 says, in relevant part: "Employees may be tested by the Company and/or a physician of its choice on a random basis, or for cause, to determine intoxication and/or prior usage of controlled substances."

[2] Agreement § 23.6(a) says: "In the event a positive result is obtained in a test of an employee and there is no evidence of influence or intoxification [sic], the individual will be suspended without pay for a minimum of 14 days."

[3] Agreement § 23.5(b) says, in relevant part: "Employees who have been tested positive may be tested thereafter . . . at no greater frequency than every seven (7) days."

[4] Agreement § 23.6(b) says: "In the event a positive result is obtained in a test administered to an employee who has been suspended without pay pursuant to sub-paragraph 6(a) above, the employee is subject to immediate discharge."

[5] Agreement §§ 13 and 14 say, in relevant part:

"13. In the event a member of the Union shall be discharged from his employment and believes he has been unjustly dealt with, such discharge shall constitute a case arising under the method of adjusting grievances herein provided. In the event it should be decided under the rules of the Agreement that an injustice has been dealt the employee with regard to the discharge, the Company shall reinstate such employee and pay full compensation at the

between Warrior and USW, the Agreement provides for outside arbitration to resolve the dispute. Agreement § 12.

On April 17, 1991, Warrior employee Rudolph Files tested positive for marijuana. It was Files' second positive test. Files had been suspended after his first positive test in 1988.

On April 29, 1991, before Warrior received the results from the April 17 test, Files was drug tested again. The April 29 test was negative.

After Warrior received the April 17 test results, it fired Files. The USW union disagreed with the decision to fire Files, and the parties asked arbitrator Bernard Marcus to adjudicate the dispute.

Marcus found that Files had been aware of these contractual requirements and that his April 17 test was legitimate, positive for marijuana, and did not violate the Agreement. But, Marcus reduced Files' penalty from discharge to disciplinary suspension. Marcus reasoned that the Agreement's "just cause" provision required Warrior to use "just and equitable" procedures in its decision to fire an employee. Marcus argued that

> . . . when the company required that Files submit a urine sample for testing on April 29, it changed the rules of the game. Thus, had the urine sample of April 17 proven negative for drugs, and the sample of April 29 proven positive for drugs, certainly the com-

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employee's regular rate for the time lost or pay compensation in accordance with the arbitrator's decision."

"14. The Management of the Company and the direction of the working force, including the right to hire, suspend or discharge for proper cause, or transfer, and the right to relieve employees from duty because of lack of work, or for other legitimate reasons, is vested exclusively in the Company, provided that this will not be used for purposes of discrimination against any member of the Union . . ."

> pany would have discharged Files pursuant to Section 23, paragraph 6(b) of the labor agreement.
>
> . . . .
>
> It is only correct and just that the company cannot have it both ways. When it required Files to submit a urine sample on April 29, the company in effect was telling Files that the April 29 test was the one on which Files' continued employment would hinge. Files passed the April 29 test. Accordingly, the company has failed to establish just cause for discharge by clear and convincing evidence.
>
> . . . .
>
> Stated differently, just cause means that the employee must be given a "fair shake".

The district court concluded that the arbitrator had no discretion to find that Warrior lacked "just cause" in discharging Files, when the express terms of the contract granted Warrior such authority under the facts determined by the arbitrator. The district court vacated the arbitrator's decision and granted Warrior summary judgment to dismiss Files. USW appeals.

II. Discussion

A court generally must defer to an arbitrator's findings of fact. *United Paperworkers Int'l. Union v. Misco, Inc.*, 484 U.S. 29, 37-38, 108 S.Ct. 364, 370, 98 L.Ed.2d 286 (1987). Once those facts are found, however, an arbitrator "may not ignore the plain language of the contract." *Misco*, 484 U.S. at 38, 108 S.Ct. at 371. ". . . [A]n arbitrator does not have unfettered discretion. He may not impose a remedy which directly contradicts the express language of the collective bargaining agreement." *Bruno's, Inc. v. United Food and Com. Wkrs. Int'l.*, 858 F.2d 1529, 1531 (11th Cir.1988).

The Agreement says that an employee who tests positive a second time is "subject to immediate discharge."

This express language gives management the complete discretion to fire an employee. Once Marcus had found that, as a matter of fact, Files tested positive for drugs for the second time on April 17,[6] these express terms required Marcus to uphold management's decision.[7]

We stop short of the question of how much discretion arbitrators have in interpreting the "just cause" provision of a contract in cases where their interpretations do not conflict with a specific and express contractual provision. Because the Agreement expressly addresses the particular contingency of a second positive drug test, we conclude that the Agreement's "just cause" standard is consistent with this explicit provision.

The Agreement allowed Warrior to conduct the April 17 and 29 tests when it did, and to discharge Files for the positive result from the April 17 test. Under these circumcumstances, we conclude as a matter of law that Warrior, pursuant to the terms of the pertinent agreement, had "just cause" to fire Files. *See, e.g., Delta Queen Steamboat Co. v. District 2 Marine Eng.*, 889 F.2d 599, 604 (5th Cir. 1989) (arbitrator exceeded authority when he reduced penalty company had exclusive right to impose); *Tootsie Roll Indus. v. Local 1 Bakery*, 832 F.2d 81, 84-85 (7th

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[6] Marcus suggested that this case is similar to *Pabco Gypsum Company*, 90-1 CCH-ARB 8054 (Weiss, 1989), where different labs evaluated a *single* drug sample in different ways: One lab found that the sample tested positive, the other negative. Because the arbitrator in *Pabco* found no positive test as a matter of fact, he deemed the discharge improper.

In this case, by contrast, the arbitrator found that the April 29 test did not discredit the results of the April 17 test. In the 12 days between the two tests, the drug-related metabolites could have been removed from Files' body.

[7] USW notes that the "subject to immediate discharge" language did not *require* management to fire Files. For present purposes, however, it is enough that management had the complete *discretion* to fire Files. Because management had, given the facts, complete discretion to fire Files, Marcus had no discretion to interfere.

Cir.1987) (having determined that employee violated "last chance" rule, arbitrator had no choice about what penalty to impose); *Riceland Foods v. United Broth. of Carpenters*, 737 F.2d 758, 760 (8th Cir.1984) (arbitrator may not review discipline standards when he finds that specific rule was violated). *See also Bruno's*, 858 F.2d at 1532 (arbitrator cannot create new rule that conflicts with explicit rule in collective bargaining agreement).[8]

AFFIRMED.

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[8] Although we allowed arbitrators to consider "just cause" in *Florida Power Corp. v. IBEW*, 847 F.2d 680, 682-83 (11th Cir. 1988), that case did not involve a situation (like second-time drug use) in which the company's collective bargaining agreement plainly and explicitly allowed the company to fire the employee. *Sullivan Long & Hagerty, Inc. v. Local 559*, 980 F.2d 1424, 1430 (11th Cir.1993), also dealt with a situation for which no plain and explicit contractual provision had been made. We allowed arbitrators to apply background labor law principles, but also reaffirmed the principle that arbitrators must follow the express terms of collective bargaining agreements. *Id.* at 1431. *See also Delta Air Lines v. Air Line Pilots Ass'n, Int'l.*, 861 F.2d 665, 671-74 (11th Cir.1988) (arbitrator's decision, that airline lacked "just cause" for discharging pilot who flew plane while intoxicated, violated clearly established public policy).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action 91-0927-AH-C

WARRIOR & GULF NAVIGATION COMPANY,
Plaintiff,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Defendant.

ORDER

This matter is before the Court on the motion of Plaintiff Warrior & Gulf Navigation Company ("Warrior Gulf") for summary judgment. The parties have agreed that there are no disputed facts and that this case is before the Court as matter of law, for summary judgment. On those facts, the Court concludes that Warrior Gulf is entitled to a judgment as a matter of law.

FINDINGS OF FACT

1. At all relevant times, Warrior Gulf and United Workers have been parties to a collective bargaining agreement governing the wages, hours and working conditions of Warrior Gulf employees in an appropriate unit certified by the National Labor Relations Board pursuant to § 9 of the Act, 29 U.S.C. § 159. A copy of that collective bargaining agreement is attached to the Verified Petition as "Exhibit 1." [Verified Petition ¶ 4 & Exhibit 1; Answer ¶ 4; Verified Counterclaim ¶ 4].

2. Section 23 of the collective bargaining agreement establishes a drug testing policy and program, including

appropriate disciplinary penalties for violations, which gives Warrior Gulf broad authority to test for drugs. Insofar as is relevant to this action, § 23 provides:

> 1. The parties recognize that the use of illegal drugs and other controlled substances . . . may impair the ability of an employee to work safely, efficiently, and productively and threaten the safety of the employee, his fellow workers, and Company property. Accordingly, the parties agree to the following rules and procedures to be followed in respect to the detection of the use of controlled substances and intoxicants by employees and corrective and disciplinary procedures to be followed in the event of such detection.
>
> 2. *It is Company policy not to hire or continue in its employ any persons who are users of controlled substances* or who report for work under the influence of intoxicants or controlled substances.
>
> * * *
>
> 4. *Employees may be tested by the Company and/or a physician of its choice on a random basis, or for cause, to determine intoxification* [*sic*] *and/or prior usage of controlled substances. . . .*
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> * * *
>
> 5. (b) Employees who have been tested positive may be tested thereafter without regard to the limitations stated in sub-paragraph 5(a) above, but at no greater frequency than every seven (7) days.
>
> * * *
>
> 6. (a) In the event a positive result is obtained in a test of an employee and there is no evidence of influence or intoxification, the individual will be suspended without pay for a minimum of 14 days.
>
> (b) In the event a positive result is obtained in a test administered to an employee who has been sus-

> pended without pay pursuant to sub-paragraph 6(a) above, the employee is subject to immediate discharge.

[Verified Petition ¶ 5 & Exhibit 1, § 23, ¶¶ 1, 2, 4, 5(b), 6(a) and 6(b), pp. 32-34; Answer ¶ 5].

3. In January 1991, Warrior Gulf instituted a practice of having all employees who receive medical treatment for on-the-job injuries tested for drugs. [Verified Petition ¶ 6; Answer ¶ 6].

4. Section 12 of the collective bargaining agreement establishes a grievance and arbitration procedure for the resolution of disputes arising under the agreement, and § 13 extends application of § 12 to disputes over the discharge of bargaining unit employees.

5. At all relevant times, Rudolph V. Files, Jr. ("Files") worked at Warrior Gulf's Mobile terminal as a mechanic/welder-burner. United Workers represented and does represent Files for the purposes of collective bargaining and the adjustment of grievances. [Verified Petition ¶ 8; Answer ¶ 8; Verified Counterclaim ¶ 6].

6. In February 1988, Warrior Gulf suspended Files without pay for fourteen (14) days following a positive test for prior marijuana use pursuant to § 23, ¶ 6(a) of the collective bargaining agreement.

7. Files and United Workers filed a grievance over Files' February 1988 suspension in accordance with § 12 of the collective bargaining agreement, but later withdrew the grievance. [Verified Petition ¶ 10; Answer ¶ 10]. That resolution of Files grievance was and is conclusive pursuant to § 12 of the collective bargaining agreement, which provides in relevant part:

> The decision reached at any state [sic] of the [grievance/arbitration] proceedings shall be binding on both parties thereto and shall not be subject to reopening by any other party except by mutual agreement.

8. On April 16, 1991, Files reported that he strained his back while installing a steering rudder on one of Warrior Gulf's vessels. He was sent to McGregor Medical, Warrior Gulf's physicians, for treatment. Although Files was asked to give a urine specimen for testing in accordance with Warrior Gulf's drug testing policy, it was not until the next day, April 17, 1991, that Files provided a specimen. That specimen was forwarded to Roche Biomedical Laboratories, Birmingham, Alabama, where it was screened positive for marijuana by an immunoassay test, rescreened by a second test with the same result and then confirmed positive by a gas chromatography mass spectrometry test. This result was communicated to Warrior Gulf on April 29, 1991.

9. On April 29, 1991, before Warrior Gulf received the drug test report on Files' April 17 specimen, Files, who had returned to work that morning, claimed that he had reinjured his back or, at least, could no longer work and was returned to McGregor Medical for further examination. In connection with that examination, he was requested to give a urine specimen for testing in accordance with Warrior Gulf's drug testing policy. [Verified Petition ¶ 12].

10. On April 30, 1991, *before Warrior Gulf knew the result of the test on Files' April 29 specimen, Warrior Gulf informed Files and United Workers that, due to the positive test result from Files' April 17 specimen, Warrior Gulf was terminating Files' employment with Warrior Gulf pursuant to § 23, ¶ 6(b) of the collective bargaining agreement.* Subsequently, Warrior Gulf was informed by Roche Biomedical Laboratories that Files' April 29 specimen had tested negative.

11. On May 3, 1991, Files filed a grievance over his termination, which grievance was appealed through the steps of the grievance procedure and referred to arbitration before Arbitrator Bernard Marcus.

12. On November 4, 1991, Arbitrator Marcus issued his decision and award, a copy of which is attached to the Verified Petition as "Exhibit 2." In his award, Arbitrator Marcus made the following findings:

> The company had the contractual right to require the April 17 drug test both pursuant to Section 23, paragraph 5(b) of the contract and under the January 1991 policy change. *The results of the April 17 test [resulting in Files' termination] are legitimate, do not violate the contract and do not conflict with the DOT guidelines. The handling of the sample and the reporting of the results have not successfully been impeached.* The evidence establishes compliance with chain of custody requirements. *Cf. Phoenix Transit System*, 87-2 CCH ARB ¶ 8510 (Speroff).
>
> Suffice it to say that Files' assertion that there could not have been a valid positive analysis from the April 17 sample because he had not used marijuana since October 31, 1987 is worthless. His claims that the signature on the chain of custody document has been forged and that someone else's sample was substituted for his urine are unworthy of belief.
>
> Files' assertion that the 12-day delay in reporting the results of the test invalidate the test completely lacks merit. The company's explanation that Roche and McGregor Medical erroneously thought that the results had to be reported to Files before they were reported to the company under the DOT guidelines is credible. McGregor's attempt to locate Files accounts for virtually all of the delay. Files was not employed within the purview of Coast Guard regulations, and when this was pointed out to McGregor Medical, the results were reported directly to the company.
>
> There is no merit to Files' claim that his urine was retested on April 29 because the company was con-

cerned that it had not received the report from the April 17 test. The fact is that when Files returned to work on the morning of April 29 and reported after lunch that he was in pain, the company acted prudently when it referred him to McGregor for a physical examination. *The company was within its contractual and policy rights to require that Files furnish a urine sample for drug testing.*

Turning to the union's attack on the chain of custody of Files' April 17 sample, testimony from McGregor Medical and Roche Laboratories personnel establishes beyond possibility of challenge that Files' urine sample was properly handled, remained inviolate and was properly reported.

Files' urine tested positive under both the company's guidelines (which were operative in this case) and the DOT guidelines. That Roche Laboratories screened the sample under the DOT guidelines is immaterial in light of the positive results under those guidelines.

* * *

In the instant case, the contractual provision, which resulted from the negotiations of the parties, assigns to the company the right to discharge any employee who fails two drug tests, regardless of the time interval or the number of drug tests the employee may have passed between the two failed tests. Files was familiar with the contractual requirement. He had been subjected to it repeatedly over the course of years. Even if the time interval had been 13 years, rather than three years, the arbitrator would be powerless to alter the bargain confected by the parties. That must be left for negotiations.

13. Despite these factual findings, Arbitrator Marcus sustained the grievance and reduced the penalty from discharge to reinstatement without back pay or seniority. [Verified Petition ¶ 16 & Exhibit 2, pp. 24-25].

14. Arbitrator Marcus explained the basis of his award as follows:

> In analyzing the role of the arbitrator in reviewing discipline assessed under agreements requiring just cause, Harry Platt suggested the following:
>
> > "It is ordinarily the function of the Arbitrator in interpreting a contract provision which requires 'sufficient cause' as a condition precedent to discharge not only to determine whether the employee involved is guilty of wrong-doing and, if so, to confirm the employer's right to discipline where its exercise is essential to the objective of efficiency, but also to safeguard the interests of the discharged employee by making reasonably sure that the causes for discharge were just and equitable and such as would appeal to reasonable and fair-minded persons as warranting discharge. To be sure, no standards exist to aid an arbitrator in finding a conclusive answer to such a question and, therefore, perhaps the best he can do is to decide what a reasonable man, mindful of the habits and customs of industrial life and of the standards of justice and fair dealing prevalent in the community, ought to have done under similar circumstances and in that light to decide whether the conduct of the discharged employee was defensible and the disciplinary penalty just." *Riley Stoker Corp.*, 7 LA 764, 767 (1947).
>
> * * *
>
> I endorse Arbitrator Platt's view, which has been adopted in myriad arbitration awards.
>
> * * *
>
> The second issue evolves from the fact that the April 17 test was positive for metabolite of marijuana, while the identical test [of another specimen] on April 29 was negative. One can speculate as to the

reason for this difference in result. Roche could have erred in analyzing the April 17 sample. Equally Roche could have erred in analyzing the April 29 sample. However, neither of these is statistically likely to have occurred. Files use of marijuana may have put him just over the screen limit on April 17, and by April 29 the metabolite in his urine might have dissipated sufficiently as to put him under the limit.

Had the company not retested Files on April 29, there would have been no basis for setting aside Files' discharge. But the company did choose to test him on April 29, which was its contractual right, and the company must live with the consequences.

Had Files generated the April 29 test, I would have paid it no attention just as I do with the tests Files generated between [1982] and 1990. What creates the problem for the company is the fact that it generated, and Files passed, the April 29 test.

It is the company's obligation to establish just cause for discharge by clear and convincing evidence. I am not satisfied that the company has met this burden in light of the negative result from the April 29 test. In the case of *Pabco Gypsum Company*, 90-1 CCH-ARB ¶ 8054 (Weiss, 1989), the arbitrator held that just cause was lacking to sustain discharge of an employee in a situation in which two separate laboratories produced conflicting drug test reports *from the same urine sample.* Admittedly the *Pabco* case is a clearer case for setting aside the discharge penalty than is this case, but the underlying question persists regarding the impact of conflicting results from two employer generated drug tests administered within 12 days of each other.

In short, the company had the right to rest on the results of the April 17 test. Had it done so, since the April 17 test proved positive for the metabolite

of marijuana, I would have been required to deny the grievance.

However, when the company required that Files submit a urine sample for testing on April 29, it changed the rules of the game. Thus, had the urine sample of April 17 proven negative for drugs, and the sample of April 29 proven positive for drugs, certainly the company would have discharged Files pursuant to Section 23, paragraph 6(b) of the labor agreement.

It is only correct and just that the company cannot have it both ways. When it required Files to submit a urine sample on April 29, the company in effect was telling Files that the April 29 test was the one on which Files' continued employment would hinge. Files passed the April 29 test. Accordingly, the company has failed to establish just cause for discharge by clear and convincing evidence.

This conclusion is supported by Arbitrator Weiss' discussion in *Pabco Gypsum Company*, 90-1 CCH-ARB § 8054 (1989), at pp. 3274-76, in which the Arbitrator sets forth the principle that the concept of just cause carries with it the requirement that the company "must have a reasonable basis for its action and follow fair procedures in so acting." Quoted from *Beatrice Foods Co.*, 74 LA 1008, 1011 (1980).

Stated differently, just cause means that the employee must be given a "fair shake." *Hiram Walker*, 75 LA 899, 900 (Belshaw, 1980).

Having concluded that the discharge from employment must be set aside, we turn to the remaining relief sought in Files' behalf. Although Arbitrator Weiss awarded a full remedy to the grievant in the *Pabco Gypsum Company* case, I have concluded that in this case there is no warrant for the award

of any backpay or other benefits. *First, Files committed a dischargeable offense, and had the company rested on the results of the testing of the April 17 urine sample, all of Files' claims would have been concluded.*

[Verified Petition ¶ 17 & Exhibit 2, pp. 17-18, 22-24].

15. On November 4, 1991, Warrior Gulf timely filed this action to vacate Arbitrator Marcus' award.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this action under 28 U.S.C. §§ 1331, 1337 and 29 U.S.C. § 185. Venue is proper under 28 U.S.C. § 1391(b).

2. Warrior Gulf is: (a) an employer as defined in Section 2(2) of the National Labor Relations Act, as amended (the "Act"), 29 U.S.C. § 152(2); (b) engaged in commerce within the meaning of Section 2(6) of the Act, 29 U.S.C. § 152(6); and (c) engaged in the business of operating tow boats between Mobile and Birmingham, Alabama, an industry affecting commerce within the meaning of Section 2(7) of the Act, 29 U.S.C. § 152(7).

3. United Workers is: (a) an unincorporated association; (b) a labor organization within the meaning of section 2(5) of the Act, 29 U.S.C. § 152(5); and (c) is engaged in this judicial district in representing employees of employers in the business of operating towboats, an industry affecting commerce as defined in section 2(7) of the Act, 29 U.S.C. § 152(7).

4. In reviewing an arbitrator's award, this Court has no power to review or reject the arbitrator's factual findings absent a showing of fraud, bias or prejudice. *IUE v. Ingram Mfg. Co.*, 715 F.2d 886, 114 LRRM 3083, 3087 (5th Cir. 1983), even if this court views the fact finding as "improvident, even silly." *UPIU v. Misco,*

Inc., 484 U.S. 29, 108 S.Ct. 364, 98 L.Ed.2d 286, 126 LRRM 3113, 3117 (1987).

5. The arbitrator, however, "may not ignore the plain language of the contract." *Misco, supra.* As the Supreme Court held in *USWA v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424, 46 LRRM 2423, 2425, (1960):

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

6. Applying these general principles, courts are usually hesitant to disturb arbitral awards in discharge cases when parties have agreed to subjective standards of "just cause," reasoning that an arbitrator's judgment in defining and applying such standards is inherent in his authority. *See, e.g., Florida Power Corp. v. IBEW*, 847 F.2d 680, 128 LRRM 2762 (11th Cir. 1988). Where, however, as here, parties have expressly agreed to define a particular kind of misconduct as just cause for discharge, courts should, and do, insist that arbitrators enforce agreements as written, reasoning that the parties have limited the arbitrator's authority solely to determining whether the contractually agreed acts of misconduct have occurred. As the Eleventh Circuit explained in *Bruno's v. Food Workers Local 1657*, 858 F.2d 1529, 1531, (11th Cir. 1988):

> The Supreme Court recently stated in *Misco*, that an arbitrator "is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating reme-

> dies." 108 S.Ct. at 372 (emphasis in original). However, an arbitrator does not have unfettered discretion. He may not impose a remedy which directly contradicts the express language of the collective bargaining agreement. *Id.* at 371; *Enterprise Wheel*, 363 U.S. at 597, 80 S.Ct. at 1361.

7. The arbitrator found as fact that Files' April 17 specimen tested positive for marijuana. He further found that to be "a dischargeable offense." This court must accept these findings of fact. *Misco, supra.* On the basis of those findings, Arbitrator Marcus' reduction of Files' penalty from discharge to suspension without pay "ignore[d] the plain language of the contract," *Misco, supra*, and "manifest[ed] an infidelity to [his] obligation" that his award "draw[] its essence from the collective bargaining agreement." *Enterprise Wheel, supra.*

8. Rather than relying on the plain language of the contract, and discharging Files for a "dischargeable offense", Arbitrator Marcus concluded

> when the company required that Files submit a urine sample for testing on April 29, it changed the rules of the game. . . . When it required Files to submit a urine sample on April 29, the company in effect was telling Files that the April 29 test was the one on which Files' continued employment would hinge.

[Verified Petition, Exhibit 1, p. 23]. Nowhere in the collective bargaining agreement is this qualification expressed. There is simply no contractual language that permitted Arbitrator Marcus to nullify the positive test on Files' April 17 specimen and "dispense his own brand of industrial justice" by reducing the contractually agreed penalty for that positive result. *Enterprises Wheel, supra*; *Misco, supra*; *Tootsie Roll Industries v. Local 1 Bakery, Confectionary and Tobacco Workers International Union*, 832 F.2d 81, 126 LRRM 2700 (7th Cir. 1987); *S.D. Warren Co. v. UPIU Local 1069*, 845 F.2d 3, 128 LRRM 2175 (1st Cir. 1988).

Only if he had found that Files' April 17 specimen had *not* tested positive could Arbitrator Marcus overturn Files' discharge. This is so because, in the "plain language" of § 23, ¶ 6(b) of the collective bargaining agreement, Warrior Gulf and United Workers expressly stipulated that, if Files tested positive "in a test administered" after his 1988 suspension, he would be "subject to immediate discharge." The contract language does not say that only if Files tested positive "in *the most recent test* administered" after his 1988 suspension would he be "subject to immediate discharge."

9. The Arbitrator's award directly contradicts the express language of, and adds an unexpressed and unbargained-for term to, § 23, ¶ 6(b) of the collective bargaining agreement. The modified provision would effectively provide:

> If a positive result is obtained in *the most recent test* administered to an employee who has been suspended without pay pursuant to sub-paragraph 6(a) above, the employee is subject to immediate discharge.

10. The difference between what Warrior Gulf and United Workers agreed to and the extra-consensual modification of the collective bargaining agreement by the Arbitrator is significant. The award nullifies the agreed-upon drug testing policy pending the results of "*a* test administered" to a previously suspended employee. Under his award, if Warrior Gulf were to exercise "its contractual and policy rights" to test the employee again on a separate and independent basis under the collective bargaining agreement, the prior test is superseded. Only if the subsequent test is positive may Warrior Gulf discharge the employee, even if the prior test is positive and the employee has thus "committed a dischargeable offense." Such an interpretation of the contract's drug testing policy means that, if Warrior Gulf, in order to protect the expected results of the prior test, were not to exercise

"its contractual and policy rights" to test the employee again, Warrior Gulf would lose an opportunity to detect, correct and discipline subsequent drug use. Such a result is intolerable and the interpretation runs directly counter to the express goal of the collectively bargained policy and requires Warrior Gulf to continue in its employment persons who are users of controlled substances even though those persons have unequivocally tested positive for drugs a second time.

11. An arbitrator cannot alter, modify or nullify an express, agreed-upon remedy in a collective bargaining agreement. In *Container Products, Inc. v. USWA*, 873 F.2d 818, 131 LRRM 2623 (5th Cir. 1989), the court of appeals affirmed a district court's vacation of an arbitrator's award that imposed a remedy in contradiction to the collective bargaining agreement:

> Despite [implicitly] finding that just cause for the dismissal existed, the arbitrator imposed an alternative remedy based on the following rationale:
>
> > There is a school of thought among arbitrators that if cause is found for the discipline assessed, then that discipline may not be overturned although it may be modified. On the other hand, there is a school of thought among arbitrators that despite a showing of cause for the discipline assessed, it may well serve the interests of the parties and promote good labor relations by providing an alternative remedy. [footnote omitted]
>
> This language seems to indicate that the arbitrator was following a school of thought allowing either modification or revision of the remedy even in a situation where just cause had been determined. This is contrary to the contract entered into between the parties. Because just cause for dismissal was found to exist, the arbitrator had no jurisdiction to

> assess an alternative remedy or impose a modification.

873 F.2d at 821, 131 LRRM at 2625. The court of appeals refused to "infer from the result alone that the arbitrator found the prerequisites necessary for his assumption of jurisdiction," 873 F.2d at 820, 131 LRRM at 2625, and held:

> Rather, an examination of the entire opinion entered by the arbitrator mandates our conclusion that the arbitrator implicitly found the existence of just cause for dismissal. Consequently, the arbitrator's alteration of the remedy imposed by the Company constituted an ultra vires act.
>
> * * *
>
> We, however, construe the Supreme Court's language [in *Misco, supra,* stressing the great deference due an arbitrator's determinations] as an admonition concerning the merits of the controversy rather than any jurisdictional prerequisites imposed by the arbitration agreement. We make this interpretation in light of the fact that vacation or modification of an arbitration award is clearly proper where the arbitrator has exceeded his authority. [footnote citation: *See* 9 U.S.C. § 10(e).] In this case, the arbtirator has, in fact, exceeded his authority. We base this conclusion on the implicit finding of just cause for dismissal apparent from the arbitrator's order.

873 F.2d at 820, 131 LRRM at 2625.

12. The Arbitrator's reliance on *Pabco* is misplaced. In Files' case, Warrior Gulf did not have, and had not informed Files of, the positive April 17 test result at the time Warrior Gulf sent Files for the April 29 testing. Files had not denied the accuracy of the April 17 test at that time and had not requested permission to take another test. Warrior Gulf, unlike the *Pabco* employer, did not agree to any request to take another test to con-

firm or negate the April 17 test results. The April 29 test was generated on a wholly separate and independent basis under the collective bargaining agreement and not to settle a dispute over the accuracy of the April 17 test results. Thus, unlike the employer in *Pabco*, Warrior Gulf did not agree to disregard the results of the earlier test and agree to abide by the later test. *See Pabco* at 3274-75.

13. In order to preserve the sanctity of the collective bargaining process, courts must vacate an arbitrator's substitution of "his own brand of industrial justice" for discipline the parties have agreed was appropriate. *See, e.g., Delta Queen Steamboat Co. v. District 2, MEBA*, 889 F.2d 599, 133 LRRM 2079, 2079 (5th Cir. 1989) (Fifth Circuit rule and the "emerging trend": "[A]britral action contrary to express contractual provisions will not be respected."); *Container Products, Inc. v. USWA*, 873 F.2d 818, 821, 131 LRRM 2623, 2625 (5th Cir. 1989).

In *Ohio Edison Co. v. Ohio Edison Joint Council*, 947 F.2d 786, 138 LRRM 2823 (6th Cir. 1991), the court held that an arbitrator had exceeded his authority when he ordered a discharged employee reinstated despite a "last chance" agreement between the employer and the union. The court noted that the employee had a marijuana use problem and the agreement between the union and the company called for discharge if there was subsequent use of the substance. The discharge occurred after tests revealed that the employee was still using marijuana. The arbitrator disregarded the agreement because he viewed the discharge as "unreasonably harsh," but the underlying labor contract provided for last chance agreements and the court held that such an agreement is binding and ordered the vacation of the arbitration award.

Common to all the foregoing cases is the fact that an employer and a union had specifically agreed that discharge was the proper remedy for certain kinds of misconduct. Each court held that an arbitrator was *not*

authorized to ignore the parties' agreement, nor modify the agreed-upon discipline.

Here the Arbitrator did precisely what *Enterprise Wheel* and the above cited cases forbid. He found that Files' April 17 specimen tested positive and that it was "a dischargeable offense." It was an explicit, direct finding that the necessary contractual predicate for Files' discharge had occurred.

14. Arbitrator Marcus did not find that Files was innocent, but only that, in Arbitrator Marcus's opinion, the negative test of Files' April 29 specimen overrode or nullified, in some unexplained fashion, the positive test of Files' April 17 specimen. Arbitrator Marcus' award does not draw its essence from, is inconsistent with and exceeds the scope of the authority vested in him by the collective bargaining agreement between Warrior Gulf and United Workers.

Accordingly, Arbitrator Marcus' award is due to be, and hereby is, VACATED.

Done this 15th day of May, 1992.

/s/ Alex T. Howard
CHIEF UNITED STATES DISTRICT JUDGE

[Filed and Judgment Entered May 15, 1992]

APPENDIX C

[Filed Dec. 20, 1993]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-6543

WARRIOR & GULF NAVIGATION COMPANY,
Plaintiff-Counterclaim-Defendant-Appellee,

versus

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Defendant-Counterclaim-Plaintiff-Appellant.

On Appeal from the United States District Court
for the Southern District of Alabama

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: ANDERSON and EDMONDSON, Circuit Judges, and YOUNG *, Senior District Judge.

PER CURIAM:

(×) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active

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* Honorable George C. Young, Senior U.S. District Judge for the Middle District of Florida, sitting by designation.

service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J.H. Edmondson
United States Circuit Judge

APPENDIX D

ARBITRATION HEARING

FMCS Arbitration File No. 91-22695

WARRIOR & GULF NAVIGATION COMPANY,
MOBILE, ALABAMA,
Employer

and

UNITED STEELWORKERS OF AMERICA,
LOCAL UNIONS 2906 AND 4754,
Union

Grievance of Rudolph Files
Before Bernard Marcus, Arbitrator

DECISION AND AWARD

The Arbitrator, selected by the parties through the facilities of the Federal Mediation & Conciliation Service, presided at the hearing, held at the Econo Lodge, Battleship Parkway, Mobile, Alabama, on Tuesday, September 24, 1991, commencing at 9 a.m.

PRESENT:

For the Employer:

Frank McRight, Esq.
Messrs. McRight, Jackson, Dorman, Myrick & Moore
1100 First Alabama Bank Building
106 St. Francis Street
Mobile, AL 36602

For the Union:

Mr. Carl Atkins, Staff Representative
United Steelworkers of America
Suite 519, 951 Government St. Bldg.
Mobile, AL 36604

The Arbitrator has fully considered the testimony of the witnesses and the exhibits introduced at the hearing, the arguments of the parties at the hearing and the post-hearing briefs of the parties, which were received on October 17 and 18, 1991, in formulating the hereinbelow Award.

The parties stipulated that the grievance at issue is substantively arbitrable.

THE ISSUE

Did the company have just cause to terminate the employment of the grievant.

If not, what should the remedy be.[1]

THE COLLECTIVE BARGAINING AGREEMENT

Section 12, "Adjustment of Grievances", of the collective bargaining agreement between the parties, provides in relevant part as follows:

> "Pending the hearing of disputes, the employees represented by the parties signatory hereto shall not cease work because of any dispute. The decision reached at any state of the proceedings shall be binding on both parties thereto and shall not be subject to re-opening by any other party except by mutual agreement."

Section 13 of the collective bargaining agreement, "Discharges Cases", provides as follows:

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[1] The company would add to the issue the clause, "if the parties had contractually agreed to what just cause is, then that standard should be the applicable standard".

"In the event a member of the Union shall be discharged from his employment and believes he has been unjustly dealt with, such discharge shall continue a case arising under the method of adjusting grievances herein provided. In the event it should be decided under the rules of this Agreement that an injustice has been dealt the employee with regard to the discharge, the Company shall reinstate each employee and pay full compensation at the employee's regular rate for the time lost or pay compensation in accordance with the arbitrator's decision."

Section 14 of the collective bargaining agreement, "Management", provides as follows:

"The Management of the Company and the direction of the working force, including the right to hire, suspend or discharge for proper cause, or transfer, and the right to relieve employees from duty because of lack of work, or for other legitimate reasons, is vested exclusively in the Company, provided that this will not be used for purposes of discrimination against any member of the Union. The right to direct the working force includes the right to assign the employee on a daily basis or otherwise to tasks within their classification."

Section 23 of the collective bargaining agreement, "Drug Testing", provides in pertinent part as follows:

". . . the parties agree to the following rules and procedures to be followed in respect to the detection of the use of controlled substances and intoxicants by employees and corrective and disciplinary procedures to be followed in the event of such detection.

"2. It is Company policy not to hire or continue in its employ any persons who are users or sellers of controlled substances or who report for work under the influence of intoxicants or controlled substances.

* * *

"4. Employees may be tested by the Company and/or a physician of its choice on a random basis, or for cause, to determine intoxification and/or prior usage of controlled substances. In the event such testing determines that the employee is then under the influence of controlled substances or intoxicants, or there is independent evidence of such influence, the employee is subject to immediate discharge. If the result of the test is positive, the Company may require the employee to submit to further testing to determine fitness for duty, but if there is no evidence that the employee is then under the influence, the procedures in Paragraph 6 of this Agreement shall apply."

* * *

"5.(b) Employees who have been tested positive may be tested thereafter . . . but at no greater frequency than every seven (7) days.

"(c) All employees returning to active employment from layoff, illness or injury are subject to a complete physical examination which may include testing for intoxification or prior use of controlled substances . . .".

"6.(a) In the event a positive result is obtained in a test of an employee and there is no evidence of influence or intoxification, the individual will be suspended without pay for a minimum of 14 days.

"(b) In the event a positive result is obtained in a test administered to an employee who has been suspended without pay pursuant to subparagraph 6 (a) above, the employee is subject to immediate discharge.

"7. The failure or refusal by an employee to submit to any test requested by the Company hereunder or the deliberate effort by an employee to falsify test results will result in an immediate discharge."

In addition, the company has adopted work rules, the validity of which are not in dispute. The penalty for violation of the work rules is immediate discharge. Rule 9 provides as follows:

> "Reporting for work under the influence of, being in possession of, while on the vessel, or bringing on to the vessel intoxicants (alcohol) or controlled substances (marijuana)."

THE FACTS

The company operates towboats on inland waters, mostly within the State of Alabama and in Mobile Bay. The grievant, Rudolph Files, was working as a mechanic/welder-burner at the time of his discharge. On previous occasions during his on and off employment with the company, Files also worked as a member of a crew of a towboat.

In February 1988, Files was suspended without pay for 14 days after his urine sample tested positive for presence of the metabolite of marijuana. A grievance was filed and ultimately was withdrawn.[2]

As a result of this, the company had the right under Section 23, paragraph 5(b) to test Files for the presence of illegal substances at a frequency of not less than every seven days.

On April 17, 1991, following an on-the-job injury, Files, at company direction, provided a urine sample at the McGregor Medical Clinic. This sample was tested at the Roche Biomedical Laboratory in Birmingham, Alabama. The sample tested positive for metabolite of marijuana as the result of an immuno-assay test which was calibrated to screen out as negative all readings below 100 ng/ml (nanagrams per milliliter). Since the sample registered positive under the immuno-assay screen, it was

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[2] According to the company, Section 12 of the labor agreement quoted above makes this binding on both parties.

subjected to a gc/ms confirmatory test which resulted in a reading of 67 ng/ml of metabolite of marijuana.

As a result of these readings, and in light of Files' early 1988 failure of a drug test, he was discharged from employment.

Later, on April 29, 1991, at company direction, Files submitted another urine sample which screened negative for drug contamination.

A timely grievance was filed, and this arbitration proceeding followed in due course.

Because of both a number of unusual events which transpired in connection with the handling and reporting of Files' April 17, 1991, urine sample and the test results therefrom, there are additional issues which the arbitrator has been obliged to consider and weigh. In addition there are additional issues which Files raised regarding the results of other drug screens, some of which he was subjected to at company insistence and some of which he personally initiated. All of these matters were intensively litigated at the arbitration hearing.

1. *Handling of sample by McGregor and Roche.* Sandie Bates, the Roche representative who was charged by McGregor with taking the sample, testified that she collected the sample from Files, checked temperature, capped and sealed it in his presence, sealed the sample in a tamper-proof plastic bag which accompanies chain of custody forms, and packed the contents in a box which was stored in a refrigerator until it was picked up by Roche's carrier. Bates testified that she filled out, and Files signed off on, the chain of custody forms. Bates specifically recalled Files' provision of the sample on April 17 because she knew Files from his previous visits to the [c]linic and also because he had been at the clinic the previous day for treatment for a back injury.

Bates further testified that while she had no specific recollection of having done so, under standard operating

procedure, she would have given Files the donor's copy of the chain of custody forms.

According to Bates, the clinic usually receives the results of urine tests from Roche in from three to seven days. In this case, after the results of the test on Files' urine were communicated to McGregor Medical, it attempted to contact Files to notify him of the results. McGregor acted in this instance under the assumption that the United States Department of Transportation (DOT) guidelines were applicable to Files and that the donor of a urine sample which tested positive was entitled to first notice of the result.

The DOT guidelines are applicable to individuals whose terms, conditions and eligibility for employment are subject to United States Coast Guard regulation. Members of the crews of towboats fall within Coast Guard regulatory purview, but shore-based mechanics, such as Files, do not.

Eventually on Friday, April 26, or on the afternoon of Monday, April 29, 1991 (the record shows both dates), McGregor's representative contacted the company and asked for assistance in locating Files. The company advised McGregor's representative that Files was not covered by the DOT guidelines, and requested him to report the results of the test directly to the company. The McGregor representative did so on April 29 by FAX at 2:48 p.m.

As it happened, because of the back injury which he had sustained on April 16, Files had been off work from April 16 until Monday morning, April 29. On April 29, his first day back at work, he reported shortly after lunch that he had severe back pains after attempting to pick a part (apparently a re-injury of the back). On April 29, the company sent Files to McGregor Medical for a physical examination.

In accordance with the company's right under Article 23, Section 5(b) of the contract, Files, on April 29,

provided another urine sample which was sent to Roche and tested for metabolite of marijuana. This sample was processed by Spring Hill Hospital and analyzed by Roche. The April 29 sample proved negative.

2. *Files' version of Roche's handling of the April 17 sample.* Files vehemently denied that that signature which appears on the employer copy of the April 17 chain of custody form was his. He testified that he signed a chain of custody form on April 17, but that some unknown party destroyed that form and created a second form which he never signed. This party forged Files' signature on the second form, attached the forged documents to a second urine sample which was substituted for Files' sample. Roche tested the second sample which proved positive but was not Files' urine.

Files further testified that he never received the employee copy of the chain of custody form on April 17 and that his later efforts to secure a copy from McGregor were unavailing. Bates testified that while she had no specific recollection of giving Files the employee copy of the chain of custody form on April 17, her invariable practice was to provide the employee with the employee copy of the form.

Files admitted that he had been subjected to numerous urine sample procedures, and it must be concluded that Files was extremely familiar with the system. It would have been highly unusual for Files not to have asked Bates for the employee copy on April 17.

A qualified handwriting expert, Dr. Richard Roper, testified that he analyzed Files' disputed signature, using the usual and universal tools of handwriting analysis, and that the signature on the employer copy of the April 17 chain of custody form was authentically that of Rudolph Files, the grievant in this case.

Files testified that his last usage of marijuana was on October 31, 1987, that he was not a user of marijuana at the time he was tested in February 1988 or on April

17, 1991, and that the long delay between April 17, when he was screened, and April 29, when the company was advised that his test was positive, establishes that someone substituted a marijuana contaminated urine sample for Files' April 17 sample, presumably in an effort to frame Files.

Files testified that after his urine sample tested positive in February 1988, he protested that the urine sample was not his urine, but had to be substituted urine. Thereafter, according to Files' testimony, prior to April 17 his urine was tested seven or eight times by the company, and each time the results were negative. Company records show five tests, all negative between June 2, 1988 and April 3, 1990. Files testified that whenever the company required a urine test, he immediately afterwards, had his urine tested independently. On each occasion between February 1988 and April 17, 1991, every pair of tests was negative. However, on April 17, Files did not have his own test made after he gave his urine sample at McGregor Medical. When asked why he omitted having his own test made, he stated that McGregor Medical was a medical clinic, so he "trusted" them to do it right.

Files did secure his own urine test after the Spring Hill Hospital urine sample was taken on April 29. Both samples proved negative on that occasion.

CONTENTIONS OF THE PARTIES

1. *The union's contentions.* In January 1991, the company unilaterally changed its policy regarding requiring a test of urine of employees who required medical attention. This not negotiated with or even announced in advance to the union. *A fortiori* the company never offered to bargain with the union about the change in policy. Accordingly, the policy change is invalid. Files was tested on April 17 as a result of his having been involved in a work-connected injury pursuant to the change in policy. Accordingly the test was invalidly conducted and must be discarded.

The company's requiring the urine test of Files on April 17, 1991 was not required by the DOT substance testing guidelines. However, Roche used DOT quantitative criteria in analyzing Files' urine and in reporting the results to McGregor. Accordingly, the conduct of the test was improper. The guidelines override the collective bargaining agreement, and the company may not use the test as a basis for disciplining the grievant.

According to the union, the report of the results of the April 17 test was delayed for 12 days instead of the normal 3 to 4 days. Therefore, it must be inferred that improprieties occurred as Files alleges in this testimony.

The company did not require the April 29 urine test of Files because of a re-injury, but rather because it had not received the results of the April 17 test. Accordingly, the company is bound by the negative results of the April 29 test.

The company failed to assure that Files received from McGregor the employee copy of the April 17 chain of custody form. This constitutes a procedural violation which mandates that any discipline which flowed from the results of the April 17 test must be disregarded.

All of this creates reasonable doubt as to the guilt of the grievant.

2. *The company's contentions.* The company contends that the union has concocted these alleged "procedural violations" out of thin air. Files attempted with all his might to avoid submitting the urine sample on April 16, and succeeded in delaying submission of the sample by one day. Such effort is indicative of fear of the results. Nevertheless, his April 17 urine sample tested positive for metabolite of marijuana. Pursuant to the contract this was his second drug violation, and discharge from employment is the prescribed response.

According to the company the DOT regulations were not applicable, but even if they were applicable, the posi-

tive test result is a complete answer to any contention that Files was not in violation of the drug abuse provisions of the bargaining contract. Indeed the DOT standard for determining a positive result is more lenient than the company's standard. Since Files' April 17 urine tested positive under DOT standards, it clearly would have tested positive under the company's more stringent standard.

The company was entirely within its rights unilaterally to decide to require drug testing prior to permitting employees to return to work following absences for medical reasons. Moreover, that Files was tested subsequent to an on-the-job injury is irrelevant. Pursuant to Article 23, Section 5(b) of the bargaining contract, Files was subject to testing for any reason at any time so long as there was a seven day interval between each test. Further, the union never requested bargaining with the company following unilateral adoption of its policy to require a urine test following a medical absence.

The company contends that the 38-month time lapse between the February 1988 suspension and the discharge in April 1991 for a second positive drug test is not too long a time lapse. First, the clear and unambiguous language of the contract mandates the conclusion that the company had the right to require of Files, a previous violator, to submit to drug tests. This is a clear and unambiguous contractual right which exists as long as the contract exists.

Second, the "law of the case" in the relationship between these two parties mandates a five-year life for last chance agreements. Clearly the shelf life of a positive drug test should be no shorter than the shelf life of a last chance agreement.

THE ARBITRATOR'S ANALYSIS

The evidence in this case is replete with red herrings which should be cleared out of the way at the outset.

The company had the contractual right to require the April 17 drug test both pursuant to Section 23, paragraph 5(b) of the contract and under the January 1991 policy change. The results of the April 17 test are legitimate, do not violate the contract and do not conflict with the DOT guidelines. The handling of the sample and the reporting of the results have not successfully been impeached. The evidence establishes compliance with chain of custody requirements. Cf. *Phoenix Transit System*, 87-2 CCH ARB ¶ 8510 (Speroff).

Suffice it to say that Files' assertion that there could not have been a valid positive analysis from the April 17 sample because he had not used marijuana since October 31, 1987 is worthless. His claims that the signature on the chain of custody document has been forged and that someone else's sample was substituted for his urine are unworthy of belief.

Files' assertion that the 12-day delay in reporting the results of the test invalidate the test completely lacks merit. The company's explanation that Roche and McGregor Medical erroneously thought that the results had to be reported to Files before they were reported to the company under the DOT guidelines is credible. McGregor's attempt to locate Files accounts for virtually all of the delay. Files was not employed within the purview of Coast Guard regulations, and when this was pointed out to McGregor Medical, the results were reported directly to the company.

There is no merit to Files' claim that his urine was retested on April 29 because the company was concerned that it had not received the report from the April 17 test.[3] The fact is that when Files returned to work on the morning of April 29 and reported after lunch that he was in pain, the company acted prudently when it referred him to McGregor for a physical examination. The

[3] But the fact that the April 29 test was negative is significant.

company was within its contractual and policy rights to require that Files furnish a urine sample for drug testing.

Turning to the union's attack on the chain of custody of Files' April 17 sample, testimony from McGregor Medical and Roche Laboratories personnel establishes beyond possibility of challenge that Files' urine sample was properly handled, remained inviolate and was properly reported.

Files' urine tested positive under both the company's guidelines (which were operative in this case) and the DOT guidelines. That Roche Laboratories screened the sample under the DOT guidelines is immaterial in light of the positive results under those guidelines.

Finally, it must be noted that Files' testimony is as full of holes as well-aged Swiss cheese. He treated his oath to tell the truth with uncaring abandon. His testimony is credited only when corroborated by documents or by another witness. Even his uncontradicted testimony is not credited unless so corroborated.

We turn to the only two issues in this case which may have substance.

1. *Time lapse between the two drug positive urine specimens.* Both parties were requested at the conclusion of the long arbitration hearing, to comment in their post-hearing briefs regarding the impact of the three-year time lapse between Files' first drug offense in February 1988 and his second drug offense in April 1991, particularly in light of both the numerous drug tests (with negative results) to which he was subjected during the 38-month interval and the company-required test of April 29, 1991, which also proved negative.

The company's post-hearing brief addresses this issue.

The company contends that under *USWA v. Enterprise Wheel & Car Corp.*, 80 S.Ct. 1358 (1960) ["the trilogy"], the arbitrator is a creature of the contract and should not interpose restrictions on company actions

which are not set forth in the contract. The problem here is that Section 23, paragraph 5(b), by its literal text, empowers the company to require weekly drug testing of a one-time violator forever unless the contract is amended. Yet courts regularly supply limitations to contracts which do not set forth a termination date. With employment contracts, in some jurisdictions the contract is valid until normal retirement; in some it may be for life. In others the contract is terminable at will, but in most the contract is good for "a reasonable time".

The question for how long a first offense lasts may be analogized to what constitutes just cause for discharge. In analyzing the role of the arbitrator in reviewing discipline assessed under agreements requiring just cause, Harry Platt suggested the following:

> "It is ordinarily the function of an Arbitrator in interpreting a contract provision which requires 'sufficient cause' as a condition precedent to discharge not only to determine whether the employee involved is guilty of wrong-doing and, if so, to confirm the employer's right to discipline where its exercise is essential to the objective of efficiency, but also to safeguard the interests of the discharged employee by making reasonably sure that the causes for discharge were just and equitable and such as would appeal to reasonable and fair-minded persons as warranting discharge. To be sure, no standards exist to aid an arbitrator in finding a conclusive answer to such a question and, therefore, perhaps the best he can do is to decide what reasonable man, mindful of the habits and customs of industrial life and of the standards of justice and fair dealing prevalent in the community, ought to have done under similar circumstances and in that light to decide whether the conduct of the discharged employee was defensible and the disciplinary penalty just." *Riley Stoker Corp.* 7 LA 764, 767 (1947).

The Platt view was quoted with approval by Arbitrator Boyer in 76 LA 1187, 1190; Newark in 76 LA 946, 952; Roumell in 73 LA 707, 709; Hayes in 56 LA 924, 926. Arbitrator Platt's continued adherence to his view is apparent from his statement in Ludington News Co., 78 LA 1165, 1167 (1982).

I endorse Arbitrator Platt's view, which has been adopted in myriad arbitration awards.

It still remains, and always remains, the employer's obligation to establish just cause for discharge. Included among the elements which the employer must prove is the fact that the time interval between the two positive drug tests must be a reasonable time. *The Trane Company*, 90-1 CCH-ARB ¶ 8113 (Redel).

However, in analyzing what is a reasonable time, the arbitrator must start with the bargaining contract. This bargaining contract does not contain any limit on the time interval between the two offenses. The parties negotiated this. Accordingly, it can be argued with some persuasiveness that the parties defined a reasonable interval between two positive drug tests as an unlimited period of time.

Further, if the contract is analogized, as the company's post-hearing brief suggests, to a last chance agreement, the only arbitration jurisprudence on point holds that if an employee has signed a last chance agreement with his employer, negotiated through his collective bargaining representative, under which he is subject to discharge in the event of any further alcoholism-related absences from employment, that agreement is permanent and will be enforced according to its terms. *Inland Container Corp.*, 91 LA 544 (Howell, 1988). In the *Inland Container* case, there was an interval of more than four years between execution of the last chance agreement and the first subsequent alcohol-related absence from employment. Arbitrator Howell stated:

> It would be inappropriate for the Arbitrator to grant the Grievant another chance; thus, voiding the 1982 settlement agreement. He chose to create the condition which causes him to stand where he is as the result of his own actions. Despite the innovative arguments so capably articulated by the Union, the grievance must be denied. The concept of a 'last chance' agreement would be rendered meaningless if the Arbitrator were to uphold the 1987 grievance of the Grievant under the circumstances of the instant case." (91 LA at 549)

While arbitrators are not bound by precedent, well reasoned prior awards are persuasive in guiding an arbitrator to a correct conclusion.

In a very recent award by Arbitrator James Odom rendered pursuant to this contract between these parties (the *Tunstall* Award), Arbitrator Odom did not enforce a five year old last chance agreement which covered an employee who had an attendance problem. The 1985 offense which had given rise to the last chance agreement had emanated from a chronic absenteeism problem. The absence from work which triggered the discharge from employment in 1990 resulted from the incarceration of the employee for driving under the influence of alcohol. Arbitrator Odom, in rejecting the company's contention that the last chance agreement should be enforced in accordance with its terms and the grievance denied, stated the following:

> "In 1985, the grievant agreed to the conditions of a last chance agreement after an incident when he failed to report as ordered. If the present incident had occurred in the year of or following the effective date of the last chance agreement—or even a year or two later, no one likely would challenge its applicability. But how long do these agreements last? Everyone would agree that they lose some of their vitality as additional years of service accumulate,

> though I am not prepared to say that a last chance agreement expires upon any specific birthday.
>
> "However, an employee should be able to purge the most wide-reaching effects of his past indiscretions through continued acceptable employment for five years. By wide-reaching, I refer to the 'any' offense provision. If the offense then and the offense now were identical, allowing part of history to impact upon the current disciplinary decision makes some sense. Here, though it might be argued that the offense of failing to report for a boat assignment when ordered is related to not being available for work, the two are in no way the same, and therefore the strict terms of the last chance agreement should not have controlled."

The company contends that the quoted language from Arbitrator Odom's award regarding repetition of the same offense should control and mandate that Files' grievance be denied in the case at bar.

While the company's argument, based on the *Tunstall* award has some force, it is not wholly persuasive. First, Arbitrator Odom rejected the application of the last chance agreement because of the five-year interval between confection of the agreement and the incident which triggered discharge, and ordered the grievant reinstated, albeit without backpay. Second, these was a relationship between the 1985 and 1990 incidents; both involved unexcused absenteeism.

Nevertheless, in the instant case the company's argument that the arbitrator should follow the literal and clear provisions of Article 23, Section 5(b) of the labor agreement is much stronger than was its argument based on the last chance agreement involved in the *Tunstall* award.

In the instant case, the contractual provision, which resulted from negotiations of the parties, assigns to the company the right to discharge any employee who fails

two drug tests, regardless of the time interval or the number of drug tests the employee may have passed between the two failed tests. Files was familiar with the contractual requirement. He had been subjected to it repeatedly over the course of years. Even if the time interval had been 13 years, rather than three years, the arbitrator would be powerless to alter the bargain confected by the parties. That must be left for negotiations.[4]

The second issue evolves from the fact that the April 17 test was positive for metabolite of marijuana, while the identical test on April 29 was negative. One can speculate as to the reason for this difference in result. Roche could have erred in analyzing the April 17 sample. Equally Roche could have erred in analyzing the April 29 sample. However, neither of these is statistically likely to have occurred. Files use of marijuana may have put him just over the screen limit on April 17, and by April 29 the metabolite in his urine might have been dissipated sufficiently as to put him under the limit.

Had the company not retested Files on April 29, there would have been no basis for setting aside Files' discharge. But the company did choose to test him on April 29, which was its contractual right, and the company must live with the consequences.

Had Files generated the April 29 test, I would have paid it no attention just as I do with the tests Files generated between 1928 and 1990. What creates the problem for the company is the fact that it generated, and Files passed, the April 29 test.

It is the company's obligation to establish just cause for discharge by clear and convincing evidence. I am not satisfied that the company has met this burden in light

[4] Perhaps it would be wise for the parties to negotiate some time limit. On the other hand, when dealing with use of illegal substances, discharge after a second fall from grace may be the wiser policy.

of the negative result from the April 29 test. In the case of *Pabco Gypsum Company*, 90-1 CCH-ARB ¶ 8054 (Weiss, 1989), the arbitrator held that just cause was lacking to sustain discharge of an employee in a situation in which two separate laboratories produced conflicting drug test reports from the same urine sample. Admittedly the *Pabco* case is a clearer case for setting aside the discharge penalty than is this case, but the underlying question persists regarding the impact of conflicting results from two employer generated drug tests administered within 12 days of each other.

In short, the company had the right to rest on the results of the April 17 test. Had it done so, since the April 17 test proved positive for the metabolite of marijuana, I would have been required to deny the grievance.

However, when the company required that Files submit a urine sample for testing on April 29, it changed the rules of the game. Thus, had the urine sample of April 17 proven negative for drugs, and the sample of April 29 proven positive for drugs, certainly the company would have discharged Files pursuant to Section 23, paragraph 6(b) of the labor agreement.

It is only correct and just that the company cannot have it both ways. When it required Files to submit a urine sample on April 29, the company in effect was telling Files that the April 29 test was the one on which Files' continued employment would hinge. Files passed the April 29 test. Accordingly, the company has failed to establish just cause for discharge by clear and convincing evidence.

This conclusion is supported by Arbitrator Weiss' discussion in *Pabco Gypsum Company*, 90-1 CCH-ARB § 8054 (1989), at pp. 3274-76, in which the Arbitrator sets forth the principle that the concept of just cause carries with it the requirement that the company "must have a reasonable basis for its actions and follow fair proce-

dures in so acting". Quoted from *Beatrice Foods Co.*, 74 LA 1008, 1011 (1980).

Stated differently, just cause means that the employee must be given a "fair shake". *Hiram Walker*, 75 LA 899, 900 (Belshaw, 1980).

Having concluded that the discharge from employment must be set aside, we turn to the remaining relief sought in Files' behalf. Although Arbitrator Weiss awarded a full remedy to the grievant in the *Pabco Gypsum Company* case, I have concluded that in this case there is no warrant for the award of any backpay or other benefits. First, Files committed a dischargeable offense, and had the company rested on the results of the testing of the April 17 urine sample, all of Files' claims would have been concluded. Second, Files' conduct on April 16 in avoiding submission of his urine sample, his preposterous misstatements under oath during the arbitration hearing, and his fantasies regarding substitution of contaminated samples in February 1988 and on April 17, 1991, negate his entitlement to a make whole remedy.

THE AWARD

1. The Company did not have just cause to terminate the employment of the grievant, Rudolph Files.

2. Files shall be offered reinstatement to his former or substantially equivalent position to which he would be entitled by virtue of his contractual seniority, within five calendar days from receipt by the company of this Decision and Award. Files' shall have five calendar days from receipt of the offer of reinstatement within which to report back to work.

3. Reinstatement shall be without backpay or any other benefits to which Files might have been entitled between the date of his discharge and the date of his reinstatement. Files' accumulation of seniority shall be

deemed to have been interrupted between the date of discharge and the date of reinstatement.

4. The company continues to have the right pursuant to Section 23, paragraph 5(b) of the collective bargaining agreement indefinitely to require Files to provide a urine sample for the purpose of conducting a drug test but not more frequently than every seven days.

Submitted at New Orleans, November 4, 1991.

/s/ Bernard Marcus
BERNARD MARCUS
Arbitrator

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
APR 19 1994
OFFICE OF THE CLERK

(2)

No. 93-1487

In The

Supreme Court of the United States

October Term, 1993

UNITED STEEL WORKERS OF AMERICA, AFL-CIO-CLC,

Petitioner,

v.

WARRIOR & GULF NAVIGATION COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

In affirming the district court's vacation of the arbitrator's award, did the Eleventh Circuit correctly decide that the arbitrator could not ignore the plain language of the collective bargaining agreement, which provided for immediate discharge of the grievant who tested positive a second time for controlled substances?

PARTIES

The parties are:

Petitioner: United Steelworkers of America, AFL-CIO-CLC ("USWA")

Respondent: Warrior & Gulf Navigation Company ("WGN"), a wholly owned subsidiary of Transtar Company.

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UNITED STEEL WORKERS OF AMERICA, AFL-CIO-CLC,

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

WGN and USWA are parties to a collective bargaining agreement governing the wages, hours and working conditions of WGN employees. Section 14 of that agreement expressly provides, "the right to . . . discharge for proper cause . . . is vested exclusively in the Company." [App. 28a][1]

[1] Citations to the Appendix of USWA's Petition are as "[App. ___]."

Section 23 of the bargaining agreement establishes a drug testing program, and provides:

> 1. The parties recognize that the use of illegal drugs and other controlled substances (including marijuana) . . . may impair the ability of an employee to work safely, efficiently, and productively and threaten the safety of the employee, his fellow workers, and Company property. Accordingly, the parties agree to the following rules and procedures to be followed in respect to the detection of the use of controlled substances and intoxicants by employees and corrective and disciplinary procedures to be followed in the event of such detection.
>
> 2. It is Company policy not to hire or continue in its employ any persons who are users of controlled substances or who report for work under the influence of intoxicants or controlled substances.
>
> * * *
>
> 6. (a) In the event a positive result is obtained in a test of an employee and there is no evidence of influence or intoxification, the individual will be suspended without pay for a minimum of 14 days.
>
> (b) In the event a positive result is obtained in a test administered to an employee who has been suspended without pay pursuant to sub-paragraph 6(a) above, the employee is subject to immediate discharge.

[App. 28a-29a]

Section 12 of the agreement establishes a grievance/arbitration procedure to resolve disputes arising under

the agreement, including disputes over the discharge of bargaining unit employees. [App. 9a]

In February 1988, WGN suspended the grievant, Rudolph Files ("Files"), without pay for 14 days following a positive test for marijuana pursuant to § 23, ¶ 6(a) of the collective bargaining agreement. [App. 30a]

On April 16, 1991, Files reported a back injury and was sent to WGN's physicians for treatment. Asked for a urine specimen for drug testing, Files provided a specimen the next day, April 17, 1991. That specimen was screened positive for marijuana, rescreened a second time with the same result and then confirmed positive by a third screening. This result was communicated to WGN on April 29, 1991. [App. 10a, 30a-31a]

On April 29, 1991, before WGN received the test report on the April 17 specimen, Files, who had returned to work that morning, reported that he had reinjured his back and could no longer work. He was sent for further medical examination, where he was asked for a urine specimen for drug testing. [App. 10a]

On April 30, 1991, before Files' April 29 specimen had been reported negative or even tested, WGN informed Files and USWA that, due to the positive test result from Files' April 17 specimen, WGN was terminating Files' employment pursuant to § 23, ¶ 6(b) of the bargaining agreement. [App. 10a]

USWA grieved Files' termination to arbitration. In his award, the arbitrator made the following findings:

> The company had the contractual right to require the April 17 drug test both pursuant to

Section 23, paragraph 5(b) of the contract and under the January 1991 policy change. The results of the April 17 test are legitimate, do not violate the contract and do not conflict with the DOT guidelines. The handling of the sample and the reporting of the results have not successfully been impeached. The evidence establishes compliance with chain of custody requirements. Cf., *Phoenix Transit System*, 87-2 CCH ARB ¶ 8510 (Speroff).

* * *

. . . [W]hen Files returned to work on the morning of April 29 and reported after lunch that he was in pain, the company acted prudently when it referred him . . . for a physical examination. The company was within its contractual and policy rights to require that Files furnish a urine sample for drug testing.

* * *

In the instant case, the contractual provision, which resulted from the negotiations of the parties, assigns to the company the right to discharge any employee who fails two drug tests, regardless of the time interval or the number of drug tests the employee may have passed between the two failed tests. Files was familiar with the contractual requirement. He had been subjected to it repeatedly over the course of years. Even if the time interval had been 13 years, rather than three years, the arbitrator would be powerless to alter the bargain confected by the parties. That must be left for negotiations. [footnote omitted]

[App. 37a-38a, 42a-43a]

Despite these factual findings, the arbitrator sustained the grievance, reduced the penalty from discharge to reinstatement without back pay or seniority and, in effect converted the discharge to a disciplinary suspension through the date of reinstatement. [App. 45a-46a]

WGN filed this action under § 301 of the Labor Management Relations Act, 29 U.S.C.1 § 185, to vacate the award. The district court vacated the award and the Eleventh Circuit affirmed. Both courts concluded that the arbitrator had ignored the plain language of the contract. That language, as the Eleventh Circuit concluded, gives WGN "the complete discretion to fire an employee" who twice tests positive for drugs, and the arbitrator "had no discretion to interfere." [App. 5a]

SUMMARY OF ARGUMENT

The Eleventh Circuit correctly decided that the arbitrator improperly ignored the plain language of the collective bargaining agreement, which provided for the immediate discharge of the grievant who had tested positive a second time for controlled substances. The cases cited by Petitioner USWA do not support USWA's argument that the Eleventh Circuit's decision is in direct conflict with the decisions of other circuits.

ARGUMENT

I. The Eleventh Circuit's Decision Is Not In Conflict with Those of Other Circuits.

There is no conflict among the circuits on the issue in question. Instead, the supposed conflict among circuits is a result of USWA's misinterpretation of the four cases it cites.

1. In *Arco-Polymers, Inc. v. Local-874, OCAW*, 671 F.2d 752 (3d Cir.), *cert. denied*, 459 U.S. 828 (1982), the Third Circuit assumed without deciding that the district court had properly concluded that the arbitrator had found that the grievant had been absent for 19 days without good and sufficient cause, conduct that would make the grievant "subject to discharge." 671 F.2d at 754. However, as the Third Circuit (and even USWA in its Petition) noted,

> It cannot be said with absolute certainty, however, that discharge under this section [providing that employees absent without good and sufficient cause "shall be subject to discharge"] is "strictly a function of management." *See, United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409 (1960) (interpreting term "strictly a function of management" as "referring only to that over which the contract gives management complete control and unfettered discretion").

671 F.2d at 756.

In contrast to the contract in *Arco-Polymers*, it can "be said with absolute certainty" that discharge under the WGN/USWA contract in this case is "strictly a function

of management." Indeed, § 14 of that contract provides that "the right to . . . discharge for proper cause is vested exclusively in the Company." No such language vesting discharge exclusively in management was cited in the *Arco-Polymers* case. Thus, the Third Circuit could properly conclude that the *Arco-Polymers* contract permitted the arbitrator to review and revise the employer's decision. Such a conclusion is not possible in this case because the WGN/USWA contract explicitly gives WGN the "complete control and unfettered discretion" to discharge. *See USWA v. Warrior & Gulf Navigation*, 363 U.S. at 584.

2. In *Crafts Precision Industries, Inc. v. Lodge 1836, District 38, Machinists*, 889 F.2d 1184 (1st Cir. 1989), the contract provided that insubordination was an "example" of "conduct that may result in suspension, or immediate discharge." 889 F.2d at 1184. The First Circuit noted that this language "is substantially more open, or ambiguous, than the language at issue" in two of its earlier cases, *S.D. Warren Co. v. UPIU Local 1069*, 815 F.2d 178 (1st Cir.), *vacated*, 484 U.S. 983 (1987), *on remand*, 845 F.2d 3, *cert. denied*, 488 U.S. 992 (1988), and *Georgia-Pacific Corp. v. Local 27, UPIU*, 864 F.2d 940 (1st Cir. 1988). As the First Circuit stated:

> In those cases, we held that the arbitrator had exceeded his authority under the contract. But, in the *Warren* cases, the contract itself *expressly* said that "violation" of "Mill Rule 7" was "*cause for discharge*" (and that the employer had "the sole right" to "discharge employees" for cause). [citation omitted]. The arbitrators in those cases specifically found a violation of "Mill Rule 7." Given the contractual language, this court did

> not see how the arbitrator could have found that dismissal was improper without violating basic laws of logic. [citations omitted]. Similarly, in *Georgia-Pacific*, the contract provided that "any employee may be discharged for just cause" and then expressly listed the conduct that the arbitrator said occurred as one *"of the causes for immediate discharge."* [citation omitted]. Once again, given language so clear, this court saw no logical way for the arbitrator to find that there was "no just cause" for discharge.

889 F.2d at 1186 (emphasis by court) (some internal bracketing omitted).

The language in the WGN/USWA contract – "shall be subject to immediate dismissal" – is virtually identical to the language in the *S.D. Warren and Georgia-Pacific* cases – "violation" of shop rule is "cause for discharge" and certain conduct is one "of the causes for immediate discharge." The language in this case (as in *S.D. Warren* and *Georgia-Pacific*) gives no indication that the prohibited conduct, under any circumstances, would warrant a lesser penalty. In contrast, the language of the contract at issue in *Crafts Precision* could logically be interpreted to mean that insubordination, under certain circumstances, could warrant merely suspension rather than immediate discharge, thus giving an arbitrator discretion to review the severity of the penalty imposed. That is not the case here. The WGN/USWA agreement clearly and unambiguously states that Files' second positive drug test was proper cause for his "immediate discharge," and that WGN had the exclusive right to discharge for "proper cause."

3. In *Eberhard Foods, Inc. v. Handy*, 868 F.2d 890 (6th Cir. 1989), the employer discharged the grievant for violation of a work rule that was not part of the collective bargaining agreement. In fact, the work rules specifically stated that they did not "supersede any clauses that may be contained in said contract." 868 F.2d at 892. The court ruled, therefore, that the arbitrator was free to determine that the "just cause" provision of the contract overrode the work rule that violation would subject the grievant to immediate discharge. Even so, the court noted that the question was "a close one," but upheld the arbitrator on the ground that the language of the contract governed and did not limit the arbitrator's power.

That is not the case here. The WGN/USWA drug testing policy with its specific authorization of discharge for a second positive test result – authority that the arbitrator conceded – was an express provision in the contract itself. Under these circumstances, the arbitrator was required to give effect to both the "proper cause" provision and drug testing policy and to give preference to the more specific drug testing policy over the more general "proper cause" provision, but did not do so. *See UAW v. Mack Trucks, Inc.*, 733 F. Supp. 938, 949 (E.D. Pa.), *aff'd*, 917 F.2d 107 (3d Cir. 1990), *cert. denied*, 499 U.S. 921 (1991) ("The law prefers a . . . reasonable, lawful and effective meaning . . . over [one that is] unreasonable, unlawful, or of no effect."); *Affiliated Food Distributors, Inc. v. Local 229 Teamsters*, 483 F.2d 418 (3d Cir. 1973), *cert. denied*, 415 U.S. 916 (1974) (contract language must be read in context, and subsequent specification limits preceding generalization). Instead, the arbitrator partially nullified the plain language of the WGN/USWA drug

testing policy by prohibiting WGN from relying upon a second positive test result as a "dischargeable offense."[2]

4. The distinction between *Kerr-McGee Chemical Corp. v. USWA Local 15258*, 800 F. Supp. 1405 (N.D. Miss. 1992), *aff'd mem.*, 988 F.2d 1214 (5th Cir. 1993), and this case lies in the courts' differing conclusions as to the extent of the arbitrators' authorities under the different collective bargaining agreements at issue in each case. In *Kerr-McGee*, the court determined that the collective bargaining agreement gave the arbitrator the authority to review and revise the employer's discharge decision. In this case, the Eleventh Circuit determined that the collective bargaining agreement did not give the arbitrator that authority. Regardless of the surface similarities between *Kerr-McGee* and this case, these different factual conclusions reached by the courts are not a basis for granting certiorari in this case.

---

[2] USWA's footnote reliance on *Super Tire Engineering Co. v. Teamsters Local 676*, 721 F.2d 121 (3d Cir. 1983), *cert. denied*, 469 U.S. 817 (1984), is also unfounded. In *Super Tire*, the employer had discharged the grievant for drinking during working hours, which the contract provided would be cause for "immediate dismissal." The arbitrator found that the employer had never applied the "immediate dismissal" provision to previous, similar offenses. Since the company never warned the grievant that it would change its past practice and begin strictly enforcing the "immediate dismissal" provision, the arbitrator in *Super Tire* concluded that the sanction of "immediate dismissal" could not be invoked.

Unlike the situation in *Super Tire*, there is no question in this case regarding the uniform application of the "immediate discharge" language in the WGN/USWA contract, and there is no question that WGN provided clear advance warning that a second positive test would result in discharge.

> The Supreme Court will usually deny certiorari when review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved, or upon the construction of particular contracts or written instruments. "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925); see, *Texas v. Mead*, 465 U.S. 1041 (1984) (Stephens, J.) . . . . The Court is even less likely to take a case to review a factual issue . . . where the findings of fact made by the district court received the concurrence of the Court of Appeals. In that situation the Court has often held that "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). . . .

Stern, Gressman & Shapiro, *Supreme Court Practice*, § 4.14, pp. 217-18 (6th ed. 1986) (some citations omitted).

Neither the *Kerr-McGee* court nor the Eleventh Circuit disagreed as to the legal issues involved. Both courts cite the same basic principles governing judicial review of an arbitrator's award and, indeed, many of the same cases. There is no conflict in construction or application of federal statutes or regulations, no conflicting interpretation of the same contract or instrument, no differing findings as to the same subject matter, and no conflict with any decision of this Court. There is, at best, only a conflict between the two courts' differing conclusions as to the extent of arbitral authority under the separate and

different contracts at issue. [*See* App. 5a-6a nn. 7-8 (Eleventh Circuit opinion making this same distinction)] That supposed "conflict" does not merit review by this Court.

II. This Case Presents No Issue with Respect to Which There Is a Split Among the Circuits.

For the same reasons, no "deep disagreement" among the circuits, as asserted by USWA in Part II of its Petition, arises based on the cases cited by USWA. Instead, those cases all rely upon the same principles governing the review of arbitral decisions which were clearly enunciated by this Court in the "*Steelworkers* Trilogy" and reaffirmed in *UPIU v. Misco, Inc.*, 484 U.S. 29 (1987).

The bases for the holdings in the cases cited by USWA are the differing facts and contractual provisions at issue in those cases. The courts of appeal uniformly have declined to enforce arbitrators' awards where the arbitrators have exceeded their authority under the different contract(s) at issue. *See, e.g., George A. Hormel & Co. v. Food Workers, Local 9*, 879 F.2d 350 (8th Cir. 1989) (cited by USWA in Petition at 17-18) (holding that arbitrator exceeded its authority where contract was not the basis of the arbitrator's award); *S.D. Warren Co. v. UPIU Local 1069*, 815 F.2d 178 (1st Cir.), *vacated*, 484 U.S. 983 (1987), *on remand*, 845 F.2d 3, *cert. denied*, 488 U.S. 992 (1988) (discussed *supra*, Part I); *Georgia-Pacific Corp. v. Local 27, UPIU*, 864 F.2d 940 (1st Cir. 1988) (discussed *supra*, Part I).

In contrast, the courts of appeal have enforced arbitrators' awards where the awards were based upon the arbitrators' interpretations of the contracts. *See Monroe*

Auto Equipment v. UAW, 981 F.2d 261, 268 (6th Cir. 1992) (enforcing award where arbitrator did not " 'refuse to apply explicit terms of the agreement' " or render an award "in 'direct contradiction of unambiguous terms of the agreement' "), *cert. denied*, 113 S. Ct. 2396 (1993); *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1506 (7th Cir. 1991) (expressly distinguishing the facts and contractual provisions at issue in *Hormel* to enforce award); *Lattimer-Stevens Co. v. USWA*, 913 F.2d 1166, 1169 (6th Cir. 1990) (enforcing award where decision was "rational and was made in regard to the language of the CBA"); *Stead Motors of Walnut Creek v. Automotive Machinists Lodge 1173*, 886 F.2d 1200, 1204-09 (9th Cir. 1989) (en banc; plurality) (reciting general rules regarding scope of arbitrators' authority as preface to deciding "public policy" exception to enforcement of awards was inapplicable to facts of case), *cert denied*, 495 U.S. 946 (1990) (cases cited by USWA in Petition at 15-19).

Again, a "conflict" that represents nothing more than differing conclusions drawn from the same principles of law, but differing facts and contractual provisions as to arbitrators' authority, does not merit review by this Court.

III. The Eleventh Circuit Correctly Ruled That the Arbitrator Exceeded His Authority.

The Eleventh Circuit's opinion in this case does not support USWA's assertion that the court improperly adopted its "own interpretation of the operative contract provisions and of the interplay between those provisions." [Petition at 17] Instead, and consistent with the

very precedents cited by USWA, the Eleventh Circuit properly determined that the arbitrator had exceeded his authority under the plain language of the particular collective bargaining agreement at issue in this case. That is the proper role of courts in reviewing arbitration awards. As this Court held in *USWA v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960):

> An arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate, only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Cf., Container Products, Inc. v. USWA, 873 F.2d 818, 820 (5th Cir. 1989) ("vacation or modification of an arbitration award is clearly proper where the arbitrator has exceeded his authority").

The Eleventh Circuit, like the district court, did not reject the arbitrator's factual findings or "weigh[ ] the merits of [the] grievance, consider[ ] whether there is equity in [the] particular claim, or determin[e] whether there is particular language in the labor agreement that would support the claim." *USWA v. American Mfg. Co.* 363 U.S. 564, 568 (1960). Rather, both courts accepted the arbitrator's factual findings that Files had tested positive a second time for drugs and had committed a "dischargeable offense." They simply determined that, having made those factual findings, the arbitrator "may not ignore the

plain language of the contract," *UPIU v. Misco, Inc.*, 484 U.S. 29, 38 (1987), and usurp a decision that the parties have collectively agreed is "strictly a function of management" because "the contract gives management complete control and unfettered discretion" to make that decision. *USWA v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584 (1960); *see Delta Queen Steamboat Co. v. District 2, MEBA*, 889 F.2d 599, 604 (5th Cir. 1989) (arbitrator cannot ignore the "natural consequence" of his finding that grievant committed a dischargeable offense and then contradict that fact by reducing the penalty which the contract gave management the complete discretion to impose), *cert. denied*, 498 U.S. 853 (1990).

The district court and the Eleventh Circuit concluded, in effect, that USWA's argument is based upon an elaborately constructed but erroneous foundation. Nowhere in his opinion did the arbitrator discuss, much less construe, the "subject to immediate dismissal" language of the WGN/USWA drug policy. Rather, he ruled that, once WGN tested Files a third time and that test was negative, WGN could no longer rely upon the second positive test result. [App. 44a-45a] The Eleventh Circuit and the district court held that this ruling exceeded the arbitrator's authority and ignored the plain language of the contract. That was their proper role.

CONCLUSION

In this case, the arbitrator found that the grievant had committed a "dischargeable offense." Notwithstanding the fact that the parties had collectively agreed that

"the right to . . . discharge" under such circumstances was "vested exclusively in the Company," the arbitrator ignored the plain language of that agreement and impermissibly dispensed his own brand of industrial justice.

There is no conflict among the circuit courts of appeal with respect to the issues raised by the petition for writ of certiorari in this case. Instead, Petitioner USWA has cited cases with holdings that differ solely on the basis of their different facts and differing contractual provisions. In such an absence of a conflict among the circuits with respect to a significant legal issue, USWA's petition for certiorari is due to be ***denied***.

Respectfully submitted this April 19, 1994.

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